89-777
No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a statute of repose, which grants a substantive right to be free from stale lawsuits, may be amended retroactively to revive potential liabilities that the statute had expressly extinguished.

LIST OF INTERESTED PARTIES

The following parties and *amicus* appeared before the United States Court of Appeals for the District of Columbia Circuit in the proceedings below:

The Wesley Theological Seminary of the
United Methodist Church
United States Gypsum Company
District of Columbia (*amicus curiae*)

USG Corporation is the parent company of United States Gypsum Company. The following corporations are non-wholly owned affiliates of petitioner United States Gypsum Company:

American Metals Corporation
BHI International, Inc.
C-S-W Drywall Supply Company
C.N.G. Distribution Limited
CGC Inc.
CIKSA, S.A. de C.V.
Construcciones, Recubrimientos
Y Acabados S.A. de C.V.
DAP Canada
DAP Inc.
Darswan, Inc.
Donn Australia
Donn Canada Ltd.
Donn Far East SDN BHD
Donn France S.A.
Donn International, Inc.
Donn International Sales Corp.
Donn Pacific Ltd.
Donn Products (U.K.) Ltd.
Donn Products GmbH
Donn South Africa (Pty) Limited
Fundy Gypsum Company, Ltd.
Gypsum Communications Co.
Gypsum Energy Management Co.

Gypsum Transportation Ltd.
L & W Supply Corporation
Little Narrows Gypsum Co.
Marstrat, Inc.
North Baldwin Park Corp.
(formerly Hollytex)
101 South Wacker Co.
Panama Gypsum Company, Inc.
Panama Wallboard, Inc.
Sequoyah Carpet Corp.
Stocking Specialists, Inc.
USG Enterprises, Inc.
USG Foreign Investments, Ltd.
USG Foreign Sales Corp.
USG Industries, Inc.
USG Interiors, Inc.
USG International, Ltd. (DISC)
USG Properties, Inc.
United States Gypsum Export Company
Westbank Planting Company
Westlake Land (Canada) Ltd.
Windsor Shipping Limited
Wiss, Janney, Elstner
Associates, Inc.
Yeso Mexicano S.A.
Yeso Panamericano, S.A. de C.V.
Yesomet, S.A. de C.V.

RULE 28.4 STATEMENT

28 U.S.C. § 2403(b) may be applicable to this petition. No court of the United States, as defined by 28 U.S.C. § 451, has certified to the D.C. Corporation Counsel the fact that the constitutionality of a statute of the District of Columbia may be drawn into question. The District of Columbia did, however, appear as *amicus curiae* in the Court of Appeals.

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OCTOBER TERM, 1989

No.

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner United States Gypsum Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on May 19, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 876 F.2d 119. The opinion of the District Court is unreported. Both opinions are reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1989. A timely petition for rehearing was denied on August 11, 1989. App. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth Amendment to the United States Constitution, Section 12-310 of the District of Columbia Code, and the District of Columbia Statute of Limitations Act of 1986, D.C. Law 6-202, 34 DCR 527 (1987). Each of these provisions is set forth in the appendix.

STATEMENT OF THE CASE

The Wesley Theological Seminary of the United Methodist Church ("Wesley") owns buildings that are located in the District of Columbia. Construction of these buildings began in the late 1950s, and was completed no later than 1961. Acoustical ceiling plaster containing asbestos was used in the construction of the buildings. The ceiling plaster allegedly was manufactured by petitioner United States Gypsum Company ("U.S. Gypsum").

In May 1985, almost a quarter century after the Wesley buildings were completed, Wesley filed a diversity action against U.S. Gypsum, seeking to recover damages on both tort and contract theories for injury to property allegedly caused by the presence of asbestos in the Wesley buildings. The complaint alleged that the acoustical plaster manufactured by U.S. Gypsum was releasing asbestos fibers into the air, and that as a result Wesley was required to undertake a costly removal program.

In its answer, U.S. Gypsum raised, among other affirmative defenses, the D.C. statute of repose, D.C. Code § 12-310. Congress enacted the statute of repose for the District of Columbia in 1972, almost 13 years before the filing of Wesley's complaint. The statute provided in relevant part that any action to recover damages for injury

> resulting from the defective or unsafe condition of an improvement to real property . . . shall be barred unless . . . such injury occurs within the ten-year

> period beginning on the date the improvement was substantially completed . . . .

D.C. Code § 12-310(a), App. 32a.[1] As Congress explained at the time it enacted the D.C. statute of repose, the purpose of the statute was "to require that justiciable controversies be brought while the evidence is still fresh and available." S. Rep. No. 1274, 92d Cong., 1st Sess. 2 (1972). The District of Columbia Court of Appeals has recently recognized that the statute "established an absolute time period within which legal proceedings must be initiated, regardless of when a cause of action accrues." *Sandoe v. Lefta Associates*, 559 A.2d 732, 736 n.5 (D.C. 1989).

Although a statute of repose bears some similarity to a statute of limitations, the two kinds of statutes are not the same. Whereas a statute of limitations is a procedural device that affects a "remedy", a statute of repose is a substantive provision that extinguishes a "right." *First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989) (discussing differences between statutes of repose and statutes of limitation). *See also School Bd. of Norfolk v. United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325, 327-28 (1987). In the District of Columbia, for example, the limitations period generally applicable to damage actions for injury to real or personal property commences to run at the time the cause of action accrues and denies the plaintiff any remedy after three years. D.C. Code § 12-301(3). The statute of repose, however, commences at the time an improvement to property is substantially completed, irrespective of when any cause of action might accrue, and confers rights upon potential defendants after ten years. D.C. Code § 12-310. As originally enacted,

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[1] By its terms, the statute of repose did not cover actions "based on a contract, express or implied . . . ." D.C. Code § 12-310(b)(1).

the D.C. statute of repose conferred upon U.S. Gypsum an unqualified right to be free from any tort claims alleging an unsafe condition at the Wesley buildings, a right that vested no later than the early 1970s.

Even before this case was filed in federal court, a similar action was proceeding in the District of Columbia court system. The District itself had filed a complaint against a number of alleged manufacturers or sellers of asbestos-containing products, raising claims similar to those that would later be raised by Wesley. *See District of Columbia v. Owens-Corning Fiberglass Corp.*, 115 D. Wash. L. Rep. 1905 (D.C. Super. 1987), *rev'd on other grounds*, —— A.2d ——, 1989 Westlaw 99482 (D.C. 1989). The defendants in *Owens-Corning* responded by raising the D.C. statute of limitations and statute of repose. Faced with these apparently dispositive defenses, the District of Columbia (to quote the trial court) "then proceeded to do *what no other litigant can do*—it changed the rules in its favor after the battle had been joined." 115 D. Wash. L. Rep. at 1911 (emphasis in original). The District pushed through [2] its City Council a bill that amended the statute of repose to make it inapplicable to "any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property." D.C. Code § 12-310(b)(3), App. 36a.

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[2] The term "pushed through" is used advisedly in this context. The District used a variety of procedural maneuvers to make sure this bill was enacted while it still could be used in the *Owens-Corning* lawsuit. For example, the District held no public hearings on the bill and avoided taking public comments. The only witnesses whom the Council heard were the Acting D.C. Corporation Counsel and his Deputy. In addition, although the normal legislative rules required 13 days between the time the bill left committee and the time it was considered by the City Council, here the rules were waived and the bill was considered after only six days. *See Owens-Corning*, 115 D. Wash. L. Rep. at 1911.

The amended statute of repose took effect in February 1987, almost two years after Wesley had filed suit and more than 26 years after the last Wesley building was completed. Nevertheless, by its terms the amendment purported to apply to this case, because the City Council provided that the new law should apply retroactively to all actions pending in a court on July 1, 1986. *See* D.C. Code § 12-311 note (1989 Repl. Vol.); App. 35a-37a.

Despite the City Council's effort to revive claims that previously had been extinguished, the District Court granted partial summary judgment for U.S. Gypsum on Wesley's tort claims. The Court held that those claims were extinguished by the pre-amendment version of the statute of repose and that the statute had conferred on U.S. Gypsum a substantive right to be free from tort claims arising from the construction of the Wesley buildings. App. 17a-24a. Because the right was substantive, said the Court, the retroactive abrogation of the statute would violate the constitutional right to due process.[3]

On appeal, Wesley argued that § 12-310 was in fact a statute of limitations, not a statute of repose. Therefore, it argued, the statute was "procedural" rather than "substantive," and thus could be retroactively abrogated without violating due process. *See* Brief for Appellant 21-25. U.S. Gypsum responded in two steps: First, it showed that § 12-310 has consistently been interpreted by the courts as a statute of repose, and that it therefore conferred substantive rights on potential defendants. Brief for Appellee 5-9. Second, U.S. Gypsum argued that the District Court's decision was correct in light of this Court's ruling in *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), which supports the view that due process forbids the retroactive abrogation of a vested substantive right. Brief for Appellee

[3] The case later went to trial on Wesley's warranty claims, and the jury found that U.S. Gypsum was not liable in any respect.

9-11. Wesley replied that *Danzer* had been effectively overruled *sub silentio* by later decisions of this Court. Brief for Appellant 26.

The Court of Appeals reversed. 876 F.2d 119 (D.C. Cir. 1989). The panel concluded that the retroactive abrogation of the immunity from suit conferred by the statute of repose did not violate due process, *even if* the rights conferred by that statute were substantive. In reaching this conclusion, the Court of Appeals abandoned the traditional "substantive/procedural" or "right/remedy" distinctions as methods of testing the validity of a retroactive application of a new law, suggesting that these distinctions are now "completely defunct." *Id.* at 122. Instead, the panel chose to apply a "mere rationality" test: as long as there was a reasonable basis for the legislative decision to apply a statute retroactively, due process was satisfied. *Id.* at 122, 123. The panel opinion did not discuss, or even cite, this Court's decision in *Danzer*.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the Court of Appeals has decided an important federal question in a way that conflicts with the applicable decisions of this Court. The Court of Appeals' reversal of the District Court's ruling on the validity of the recent amendment to the D.C. statute of repose is inconsistent with settled law regarding due process limitations on the legislative power to eliminate vested rights. By attempting to revive claims that have been expressly extinguished by statute, D.C. Law 6-202 retroactively abrogates a substantive right conferred by Congress and thus violates the due process clause.

If the decision below is permitted to stand, it will create an enormous potential for mischief under both state and federal law. The vast majority of states have enacted some form of statute of repose. The Court of Appeals' decision here defeats the reliability of those

statutes and creates the very uncertainty that a statute of repose is designed to avoid. It invites legislatures to resurrect claims whenever it seems expedient to do so, regardless of what statutory assurances previously have been given to prospective defendants and regardless of what effect those assurances and the passage of time may have had on a party's ability to defend against newly revived claims. This Court should intervene to prevent this kind of departure from precedents recognizing the constitutional protection of vested rights and to reconfirm the distinction, recognized in the Court's earlier decisions, between substantive and procedural measures.

I. The Decision Below Ignores And Contravenes The Relevant Case Law Of This Court

The Court of Appeals rejected the distinction between substantive rights and procedural rights as a means of evaluating whether the retroactive application of new law violates due process. This distinction, however, has been repeatedly recognized and applied by this Court, and it provides an apt basis for distinguishing between statutes of repose and statutes of limitation.

This Court has held that certain procedural provisions, such as statutes of *limitations*, may be retroactively changed by the legislature without violating due process. In *Campbell v. Holt*, 115 U.S. 620 (1885), for example, the Court sustained the retroactive abrogation of a state statute of limitations, concluding that "no right is destroyed when the law restores a remedy which had been lost." *Id.* at 628. The Court's analysis made clear, however, that the result would be different if a statute retroactively deprived a party of a substantive right; the Court indicated that once a substantive property right had "vested" in the defendant, a legislative attempt to abrogate that right would constitute a taking without due process. *Id.* at 623-624, 628.

The distinction between procedural and substantive rights became the decisive factor in *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), a case that is closely analogous to the current one. In *Danzer*, the plaintiff brought a claim under the Interstate Commerce Act, which provided that claims for damages had to be filed within two years from the date the cause of action accrued. Plaintiff filed its claim after the two years had passed, but argued that its cause of action had been revived by a subsequent amendment to the statute. The amendment provided that the two-year period was tolled under certain circumstances, and apparently there was no dispute that if the amendment applied retroactively it would have revived plaintiff's claim. *Id.* at 634-35.

This Court held that the amendment could not be given retroactive effect, and affirmed the dismissal of the case. 266 U.S. at 637. The Court distinguished the case from *Campbell v. Holt*, *supra*, on the ground that a statute of limitations, like that at issue in *Campbell*, "related to the remedy only," whereas the provision of the Interstate Commerce Act involved in *Danzer* "not only barred the remedy but also destroyed the liability of defendant to plaintiff." *Id.* at 636-37. To apply the amendment to the statute retroactively would therefore "create liability," because the defendant already had been legislatively granted the right to be free of such suits. The Court concluded that such a right could not be retroactively destroyed without violating the Fifth Amendment. *Id.* at 637.

In *Chase Securities Corp. v. Donaldson*, 325 U.S. 309 (1945), the Court again explicitly recognized the distinction that was rejected by the court below. In sustaining a retroactive change to a state statute of limitations, the Court followed *Campbell v. Holt*, *supra*, and distinguished *Danzer*. *Id.* at 311-12 & n.8. Writing for a unanimous Court, Justice Jackson explained:

> The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.

Id. at 314. The immunity conferred by a statute of repose is not only substantive, but the rule is also one in which "stability" rather than "flexibility" is of prime importance.

Danzer should have been controlling in the current case. There is no doubt that the effect of § 12-310 was to create a *substantive* right to be free from liability after the passage of ten years. As the Fourth Circuit has noted in a case involving the D.C. statute of repose, the "argument that [the statute] should be characterized as procedural is refuted by the overwhelming weight of authority holding that statutes similar to that provision are substantive rather than procedural." *President and Directors of Georgetown College v. Madden*, 660 F.2d 91, 94 (4th Cir. 1981) (per curiam). *See also First United Methodist Church of Hyattsville v. United States Gypsum Co.*, *supra*, 882 F.2d at 865-66 (construing a statute of repose "nearly-identical" to the D.C. statute as providing "a substantive right . . . to be free from liability after a legislatively-determined period of time"). There also is no doubt that this substantive right had become "vested" for more than a decade by the time Wesley brought suit.

The Court of Appeals' decision is therefore inconsistent with *Danzer* in two ways. First, it incorrectly finds that the retroactive abrogation of vested rights conferred by a statute of repose is permissible under the due process clause. Second, and more important, the decision below rejects the entire method of analysis employed in *Danzer* and approved in other decisions of this Court.

The Court of Appeals made no attempt to distinguish *Danzer*; indeed, *Danzer* was not even cited. Instead, the

Court of Appeals relied on more recent decisions of this Court, particularly *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1978). In *Turner Elkhorn*, the majority noted that economic legislation carries with it a presumption of constitutionality and that a party challenging the legislation has the burden of showing that Congress has acted "in an arbitrary and irrational way." *Id.* at 15-16. The Court added that new legislation is not *per se* unlawful simply because it upsets settled expectations, or because it imposes a "new duty or liability based on past acts." *Id. See also Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984) (retroactive legislation may pass constitutional scrutiny by a showing that the decision to apply the statute retroactively "is itself justified by a rational legislative purpose").

The opinions relied on by the Court of Appeals do not remove the inconsistency between *Danzer* and this case. First, neither *Turner Elkhorn* nor *Gray* purported to overrule *Danzer*, nor did they reject the substance/procedure distinction that underlies the holding in *Danzer*. Indeed, shortly after *Turner Elkhorn* was decided, this Court recognized the continuing validity of *Danzer* and the right/remedy distinction in *International Union of Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 243-44 (1976). The *Robbins & Meyers* opinion, which involved a dispute over the revival of time-barred claims, noted that *Danzer* is inapplicable to cases involving the retroactive extension of remedial limitations periods. *Id.* (citing *Chase Securities, supra*). Significantly, the *Robbins & Meyers* decision makes no mention of *Turner Elkhorn*, nor does it adopt the analysis set forth in that case. This subsequent recognition of *Danzer* is impossible to reconcile with the Court of Appeals' conclusion that *Turner Elkhorn*—which did *not* involve time-barred claims—now provides the proper analytical framework for these cases. The lower court's failure to mention *Danzer* as relevant precedent becomes even more surpris-

ing in light of the recognition of that case in *Robbins & Meyers*.

Second, there is a crucial difference between this case and the decisions relied on by the Court of Appeals. The aggrieved parties in *Turner Elkhorn* and *Gray* were claiming that it was unfair to make them liable for events that happened before the statute in question was passed. Critically, however, the aggrieved parties could not allege that the statute abrogated an *existing* right to be *free* from liability; their arguments were limited to allegations that there had been no statute regulating their conduct in the past and that it was therefore inequitable to impose liability on that conduct after the fact. *See Turner Elkhorn*, 428 U.S. at 15. *See also Gray*, 467 U.S. at 725-26.

In this case, however, as in *Danzer*, the defendant was *expressly* granted by Congress a right to be free from liability after a fixed amount of time, a right that had vested before the statute of repose was amended. Accordingly, even if there is no constitutional prohibition on regulating past conduct that was previously unregulated, it does not necessarily or even logically follow that the retroactive abrogation of a *vested* substantive right, expressly granted by statute, is similarly permissible. *See generally Bradley v. Richmond School Board*, 416 U.S. 696, 720 (1974) (new law should not be applied retroactively where "to do so would infringe upon or deprive a person of a right that had matured or become unconditional").

Of course, in determining whether to grant review, this Court need not finally resolve U.S. Gypsum's claim of a due process violation. The relevant and indisputable consideration is that the Court of Appeals' decision and the abandonment of the substance/procedure distinction are in conflict with the binding procedents of this Court. *See Campbell v. Holt*, *supra*; *Danzer*, *supra*; *Chase Securities*, *supra*; *Robbins & Meyers*, *supra*. Given this conflict, and

given the importance of the question to the lower courts, review by this Court is warranted.

II. The Decision Below Will Create Confusion In The Lower Courts

The Court of Appeals' decision, if allowed to stand, is likely to cause great confusion in both state and federal courts. The evidence of this comes from two sources: the fact that other cases continue to follow the substance/procedure distinction in analyzing analogous questions, and the prevalence of similar state statutes of repose and revival statutes, the validity of which may be called into question as a result of the decision below.

Other courts that have examined this issue have concluded that statutes of repose may not be retroactively abrogated. In *Colony Hill Condominium I Ass'n v. Colony Co.*, 70 N.C. App. 390, 320 S.E.2d 273 (1984), *rev. denied*, 312 N.C. 796, 325 S.E.2d 485 (1985), the North Carolina court noted that "[a] statute of repose, unlike an ordinary statute of limitations, defines substantive rights," and that the failure to comply with the statute "gives the defendant a vested right not to be sued." *Id.* at 276. The court then relied specifically on *Danzer* in holding that "a revival of the defendants' liability to suit, long after they have been *statutorily entitled to believe it does not exist*, and have discarded evidence and lost touch with witnesses, would be so prejudicial as to deprive them of due process." *Id.* at 276 (emphasis added). *Accord, School Board of Norfolk v. United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (1987) (construing Virginia Constitution's due process clause to prohibit retroactive abrogation of statute of repose).

The impact of the Court of Appeals' opinion will not be limited to cases involving statutes of repose. *See generally United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 677 (D.N.J. 1987) (applying Superfund amendments retroactively because "they do not affect or change

vested substantive rights of the parties, but merely their procedural rights and form of legal remedy"). In abandoning the substance/procedure distinction, and in suggesting that the *Turner Elkhorn* analysis applies to all cases involving economic legislation, the Court of Appeals has left open the possibility that any substantive right, even a right specifically granted by statute, may be taken away on nothing more than a showing that the legislature had a plausible reason for doing so.

Finally, guidance from this Court is necessary to determine the continuing validity of rights that already have vested under the existing state statutes of repose. Forty-four states have some type of repose statute that extends a vested right to be free from some types of litigation. *See* App. 38a-39a. Thirty-three of these statutes specifically cover claims arising from building design and construction. *Id.* Even if one were to consider just the asbestos-in-building claims that have been filed around the country,[4] it becomes obvious that the validity and effect of statutes of repose is an issue of great social significance. In addition, eight states have passed, and a number of others have introduced, revival statutes that may operate to override vested rights of repose. *See* App. 39a. A clear rule of law is therefore essential to avoid conflicting interpretations of the due process clause.

This Court has consistently recognized the importance of statutes of repose to an efficient, orderly system of

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[4] Suits similar to the current one have been filed against more than 90 different manufacturers and suppliers of asbestos and asbestos-containing building products around the country. Although Petitioner does not know the exact number of cases that have been filed, over 200 asbestos-in-building actions have been brought against U.S. Gypsum. This number includes individual lawsuits that involve dozens of named plaintiffs, and single-plaintiff cases involving thousands of separate buildings. This number also includes both statewide and nationwide class actions, as well as suits by various county, municipal, and state governments.

justice. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of repose "protect defendants and courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence . . . fading memories, disappearance of documents, or otherwise"); *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1823) (Story, J.) (a statute of repose "is a wise and beneficial law . . . designed . . . to afford security against stale demands"). Indeed, the current dispute provides a unique opportunity to address the constitutionality of retroactive changes in such legislation, because the very purpose of a statute of repose is to provide parties with the certainty that their long-past actions will not be a source of future litigation. There is a strong public interest in ensuring this certainty, because as this Court has recently noted, "[o]n a human level, uncertainty is costly to all parties. . . . Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." *Wilson v. Garcia*, 471 U.S. 261, 275 n.34 (1985). To conclude that this interest may be overridden for virtually any reason is to admit that the interest is illusory; a repose statute that cannot assure freedom from stale claims is a meaningless exercise of the legislative power. A settled right to repose is an area in particular for which people are entitled to protection from the fluctuating policy of the legislature. The Federalist No. 44, at 279 (J. Madison) (Britannica 1952). This case presents an ideal opportunity to clarify the standards that should apply when assessing challenges to the retroactive abrogation of vested repose rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 9, 1989

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7144

THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH,
Appellant,

v.

UNITED STATES GYPSUM COMPANY,
Appellee

Appeal from the United States District Court for the District of Columbia
(Civil Action No. 85-01606)

Before STARR, WILLIAMS and D.H. GINSBURG, Circuit Judges

Opinion for the Court filed on May 19, 1989 by Circuit Judge WILLIAMS

A firm or firms that constructed buildings for The Wesley Theological Seminary in 1957-60 used ceiling tiles purchased from the defendant, United States Gypsum Company. The tiles contained asbestos. In early 1984 an industrial hygienist retained by Wesley reported that the

ceilings had released asbestos fibers in the past and would do so in the future. Wesley then began a removal program. On May 17, 1985 it filed a diversity action in tort and contract against U.S. Gypsum and others.

Among the defenses invoked by U.S. Gypsum's answer was the then operative version of a statute of repose, D.C. Code § 12-310 (1981). This statute barred certain actions for injury resulting from defective improvements to real property if the *injury* occurred more than 10 years after the improvement's completion. The parties quarrel over whether the statute is a subspecies of statute of limitation or belongs to a different species altogether. We do not enter into this semantic dispute, but we note that the statute is certainly distinct from a conventional statute of limitation in that the bar operates not when the *suit* is filed too late, but when the "*injury*" occurs too late—here, more than 10 years after completion of the improvement. Here, although elements of the analytic chain by which § 12-310 would probably operate to bar the claim are disputed, it seems highly likely that it would have done so but for an amendment (to be discussed shortly) that was enacted in 1987. First, there is at least a very strong argument that for purposes of § 12-310 no "injury" occurred until after the passage of 10 years. *Cf. Bussineau v. President and Directors of Georgetown College*, 518 A.2d 423, 425, 428, 435 (D.C. 1986) (equating accrual of a cause of action for statute of limitation purposes with occurrence of "injury" and requiring that the injury be discoverable with reasonable diligence). Second, under the decision of the Court of Appeals of the District of Columbia in *J.H. Westerman Co. v. Fireman's Fund Ins. Co.*, 499 A.2d 116 (D.C. 1985), the statute protected *manufacturers* of a component of an improvement.

On February 28, 1987, however, District Law 6-202 came into effect, reversing the *Westerman* decision and removing this critical element in U.S. Gypsum's use of § 12-310 as a defense. The amendment made the statute

inapplicable to "any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property." D.C. Law 6-202, 34 D.C.R. 527 (1987), *codified at* D.C. Code §§ 12-301, 12-310 (b) (2)-(4), (Michie Supp. 1988). It was expressly made applicable to actions pending in a court on July 1, 1986. See D.C. Code § 12-311 note (Michie Supp. 1988); D.C. Law 6-202, § 6.

The district court granted partial summary judgment for U.S. Gypsum on Wesley's tort claims, applying the earlier version of D.C. Code § 12-310. The court reasoned that that version conferred on defendant a "substantive" right not to be sued, which vested before 1987, and that therefore any retroactive divestment of its protection would violate defendant's rights under the due process clause of the Fifth Amendment.

The case went to trial on Wesley's breach of warranty claims, and a jury found U.S. Gypsum free of liability. The district court entered judgment accordingly. Wesley argues here that the court erred in invalidating the retroactive amendment of the statute of repose. It also claims error in certain evidentiary rulings, and in the district court's directed verdict against Wesley on the punitive damages component of its contract claim.

We reverse the judgment of the trial court dismissing Wesley's tort claim and affirm in all other respects.

I. Retroactive Repeal of the Statute of Repose

The parties agree that if § 12-310 were a statute of limitation the due process clause would not prevent the District from extending the period and thereby reviving a cause of action that the statute had expunged. *See International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945); *Campbell v.*

Holt, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885). The defendant claims to find in *Chase* and *Campbell* a simple dichotomy between procedure and substance, under which changes in purely procedural provisions may be retroactive while changes in substantive ones may not. This constitutes the major premise of a proposed syllogism. Defendant would add a minor premise, that statutes of repose are substantive. The desired result follows automatically.

We may in fact resolve this case, however, without classifying the District's statute as substantive or procedural. The cases simply do not support defendant's major premise.

First, the cases upholding retroactive application of amendments of statutes of limitations by no means give the procedure/substance distinction anything like the place that U.S. Gypsum suggests. *Robbins* and *Campbell* do not mention it. *Chase* does so, but in terms that fall far short of establishing defendant's theory. Justice Jackson wrote:

> The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.

325 U.S. at 314, 65 S.Ct. at 1142. While the sentence lends some support to defendant's major premise, it reformulates the distinction as being between rules for which "stability" is important and ones for which "flexibility" is critical. Justice Jackson then turned to a lengthy quotation from an opinion written by Justice Holmes as Chief Justice of the Supreme Judicial Court of Massachusetts. After a passage talking of the inexactitude of constitutional restraints, "end[ing] in a penumbra

where the Legislature has a certain freedom in fixing the line," [1] Justice Holmes proceeds (in the quotation) to a characteristic statement of an entirely functional test:

> But however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

325 U.S. at 315, 65 S.Ct. at 1143, quoting *Danforth v. Groton Water Co.*, 178 Mass. 472, 476, 59 N.E. 1033 (1901).

Later decisions have emphatically confirmed Holmes's view of the matter, both in its functionalism and in its hint of the leeway open to legislative bodies. Thus in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), the Court approved Congress's creation of an entirely new liability of coal mine operators for death or illness of miners where linked, through a series of stringent presumptions (some of them irrebutable), to work in an operator's mines, even if the work long antedated the passage of the statute. The Court dealt curtly with the due process objection based on retroactivity, seemingly testing the statute merely for rationality:

> [L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . . [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled

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[1] For a discussion of judicial use of the "penumbra" metaphor, see Burr Henly, *'Penumbra': The Roots of a Legal Metaphor*, 15 Hastings Con. Law Q. 81 (1987).

> expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

428 U.S. at 15-16, 96 S.Ct. at 2892 (citations omitted). And in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984), the Court sustained the imposition of a novel "withdrawal liability" on employers who withdrew from multi-employer pension plans before the passage of the burden-creating legislation. Again the Court invoked the modest "rationality" standards that it generally applies to "economic" legislation:

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . .
>
> To be sure . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

467 U.S. at 729-30, 104 S.Ct. at 2717-18.

At this point, therefore, any substance/procedure dichotomy suggested by *Chase* is either completely defunct or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes.

Application of *Turner Elkhorn* and *Gray* is not difficult here. We cannot say it is irrational for the District to decide that the losses due to defects in building ma-

terials discovered long after installation should fall on the supplier rather than the building's owner. Indeed, defendant makes no claim of irrationality. Moreover, defendant's equities are not especially powerful; the statute of repose became law only in 1972, see Pub.L. No. 92-579, 86 Stat. 1275 (1972), about 12 years after the last building at issue was completed. Thus defendant made the sales without reliance on the statute. See *Turner Elkhorn*, 428 U.S. at 17 & n. 16, 96 S.Ct. at 2893 & n. 16 (discussing relevance of a party's reliance on prior law).

None of this is to deny U.S. Gypsum's arguments that there are real distinctions between a statute of limitation and one of repose. Defendant frames the distinction around the existence of a cause of action, saying that a statute of repose prevents one from ever coming into existence (unless the terms are satisfied), whereas a statute of limitation causes the expiration of an existing cause of action. We think this line of distinction may be somewhat metaphysical. If a statute of limitation extinguishes an undiscoverable cause of action, as some do, one could easily recharacterize it as a statute of repose: so viewed, it prevents the claim from ever accruing (with discovery, or the possibility of discovery, being a necessary component of acrual). Thus we rest more confidence in the distinction suggested earlier, in terms of the event that *satisfies* the statute (i.e., an injury, for a statute of repose; filing of suit, for a statute of limitation). But we need not tarry with these theoretical points. Even if they proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim.

U.S. Gypsum seeks to distinguish such cases as *Turner Elkhorn* and *Gray* on the ground that the present case is not one "where the legislature is imposing liability for past acts which had not previously been legislatively addressed at all." Appellee's Brief at 12-13. We fail to perceive a distinction of constitutional magnitude between an

expectation of nonliability that arises from legislative silence and common law nonliability, and one that arises from the type of affirmative legislative action present in this case. For support the defendant cites *Bradley v. Richmond School Board*, 416 U.S. 696, 720, 94 S.Ct. 2006, 2020, 40 L.Ed.2d 476 (1974), which addresses a quite different issue—the factors a court, confronted with a change in law during the pendency of litigation, should consider in deciding whether to apply the new law in the absence of specific legislative guidance. See *id.* at 710-16, 94 S.Ct. at 2015-19; *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

Acordingly, we must reverse the district court's decision invalidating the retroactive effectiveness of the statute of repose.

II. Evidentiary Rulings

Wesley appeals from the district court's decision to exclude certain exhibits and expert testimony that it argues it needed to prove that U.S. Gypsum knowingly concealed the asbestos danger. We affirm the rulings of the district court on substantially the grounds stated and limit our discussion to a single disputed exhibit.

PX-510 is a letter addressed to a U.S. Gypsum executive in 1936, summarizing the results of studies carried out in U.S. Gypsum's plant by a Dr. Leroy Gardner. Dr. Gardner concluded that a serious asbestos dust hazard existed in the plant. He discussed other studies which proposed a maximum safe level of "five million particles of free silica per cubic foot of air." He distinguished silica dust from asbestos dust, however, and concluded that this standard was not necessarily applicable to asbestos dust.

Wesley seeks to treat as a smoking gun the letter's observation that "[t]here is no standard for safe concentration of asbestos dust comparable to the value just given for free silica dust." In context, however, this is simply

a statement that, due to the absence of enough research, no one could yet identify the safe level for occupational exposure. Similarly, the letter's discussion of an asbestos dust study which found a 10% asbestosis rate among workers exposed to five million particles per cubic foot of dust was of remote relevance at best. While it sugests that U.S. Gypsum was on notice that the safe level for occupational exposure to asbestos dust on a full-time basis was less than five million particles per cubic foot of air, it does almost nothing to establish Wesley's central thesis—that the defendant was aware that asbestos-containing ceiling tiles, once installed, created hazardous concentrations.

Thus the district court was well within its discretion in ruling the letter unduly prejudicial. Moreover, for any proper purpose the exhibit was cumulative; U.S. Gypsum admitted in its opening statement to the jurors that for years there had been no question that asbestos caused disease at high-level occupational exposures over long periods of time. See Tr. 40.

III. Directed Verdict on Punitive Damage Claim

The district court entered a directed verdict against Wesley on its claim for punitive damages for the alleged breach of warranty. We doubt that such a direction of verdict could ever be reversible error where the jury rejects the substantive claim to which the request for punitive damages is appended; exoneration on the substantive claim seems to moot the issue of punitive damages. The court's direction of the verdict in no way reduced the evidence available to the jury. And while inclusion of a charge on punitives might have given a derogatory tinge to the actual evidence, and to the defendant itself, plaintiff had no legal right to any such spillover.

In any event, a directed verdict "is proper only if, viewing the evidence in the light most favorable to the plaintiff and giving him the advantage of every fair and

reasonable inference that the evidence may permit, there can be but one reasonable conclusion drawn." *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 827 (D.C. Cir. 1988). Here only one conclusion could have been drawn. If indeed punitive damages are recoverable on a warranty claim, then in order to be entitled to have its punitive damages claim go to the jury, District law required Wesley to offer evidence of conduct "outrageous, characterized by malice, wantonness, gross fraud, recklessness, or willful disregard of the plaintiff's rights." *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C.), *cert. denied*, 459 U.S. 912, 103 S.Ct. 221, 74 L.Ed.2d 176 (1982). Plaintiff clearly did not prove that defendant's knowledge of asbestos hazards could justify such a brand on its conduct.[2]

IV. CONCLUSION

Although rejecting the errors asserted by plaintiff as to the disputed evidentiary rulings and the partial directed verdict, we must reverse the judgment on account of the dismissal of the tort claim and remand for further proceedings consistent with this opinion.

So ordered.

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[2] Of course, our decision here does not speak to any punitive damages claim that plaintiff may assert on its tort claim on remand.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7144

WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH,
Appellant

v.

UNITED STATES GYPSUM COMPANY, *et al.*

Before: Williams and D. H. Ginsburg, Circuit Judges

ORDER

[Filed Aug. 11, 1989]

Upon consideration of appellee's petition for rehearing it is

ORDERED, by the Court that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1606

WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH,
Plaintiff,

v.

UNITED STATES GYPSUM COMPANY, *et al.*,
Defendants.

MEMORANDUM OPINION

[Filed Jan. 5, 1988]

This matter now comes before the Court on defendants' joint motion for summary judgment on the basis of the statute of repose, plaintiff's motion for partial summary judgment seeking dismissal of the affirmative defenses of assumption of the risk, contributory negligence, and the statute of limitations,[1] and defendants' second joint motion for summary judgment on multiple grounds. For the reasons set forth below, defendants' motions are denied in part and granted in part and plaintiff's motion is denied.

I. Factual Background

Plaintiff Wesley Theological Seminary of the United Methodist Church ("Wesley") filed this product liability action in May 1985 seeking to recover the costs associated with removing defendants' plaster products, which con-

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[1] Defendants have subsequently withdrawn the first two of the challenged defenses. Defendants' Joint Opposition to Plaintiff's Motion for Partial Summary Judgment, at 2.

tain asbestos, in four of plaintiff's buildings. The complaint aserts causes of action based on strict liability, negligence, breach of express and implied warranties, fraud and misrepresentation, "intentional tort," "concert of action," and "conspiracy." [2]

The Wesley buildings at issue—the Trott Administration Building, the Kresge classrooms, the Straughn Dormitory, and the Library—were constructed during the period of 1957 through 1961. Exhibit ("Pl. Exh.") 1 to Plaintiff's Opposition to Defendants' Joint Motion for Summary Judgment ("Defs. Motion"), Plaintiff's Answers to Defendants' Joint Interrogatory ("Pl. Answer") at No. 4. The architect specified the products of defendants United States Gypsum Company ("U.S. Gypsum") and National Gypsum Company ("National Gypsum") for the acoustical ceiling plaster in the buildings. Pl. Exh. 30, Deposition of A. Hensel Fink ("Fink Depo."), at 23-24.[3]

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[2] Plaintiff originally also asserted liability on the basis of nuisance and restitution, but has since abandoned these causes of action. Plaintiff's Motion for Partial Summary Judgment at 1 n.1.

[3] Although he had no recollection of his specific decision to specify defendants' products for the Wesley buildings, Fink chose them because they were the "two leading companies and we always specified them." Fink Depo. at 23. He used information provided by defendants in their listing of the products in Sweets Catalog, the "architect's bible." *Id.* at 25.

Blind bulk sampling conducted by plaintiff's product identification expert during discovery in this case indicates that National Gypsum's product "Sprayolite" was used in the Library and United States Gypsum's product "Audicote" was used in the other three buildings (Trott, Straughn, and Kresge). Pl. Exh. 33.

After receiving this report, plaintiff dismissed the third manufacturer it had originally named as a defendant, W.R. Grace Co. ("Grace"). On September 21, 1987, Grace moved for attorney's fees under Rule 11 on the basis that plaintiff or its counsel could have determined that Grace's products were not in the Wesley buildings prior to instituting this action. Plaintiff opposes that motion and has itself moved for fees and costs incurred in responding to Grace's motion. Both of these motions are under advisement.

Wesley was unaware that its buildings contained asbestos until late 1983 or early 1984 when a general concern about asbestos was brought to the attention of Wesley's Buildings and Ground Committee by Wesley's President G. Douglass Lewis. Exhibit ("Defs. Exh.") 4 to Defs. Motion, Deposition of Reverend Douglas Cooney ("Cooney Depo."), at 9; Pl. Exh. 34, Deposition of G. Douglass Lewis, ("Lewis Depo.") at 17, 20. Wesley hired an industrial hygienist, Marshall Marcus, Jr., to survey its premises for the presence of asbestos and to make recommendations. Cooney Depo. at 14. In his January 1984 report, Marcus concluded that asbestos fibers from Wesley's acoustical plaster ceilings "have become airborne . . . in the past, and that they will continue to do so in the future." Pl. Exh. 38. He informed Wesley that "airborne fibers will be present at low concentrations, but they are dangerous nevertheless," and he recommended removal and abatement. *Id.* Wesley decided to remove the asbestos in the areas that had been damaged by water leakage, to solicit a second technical opinion, and to seek advice of counsel because of the financial implications of Marcus' recommendations. Pl. Exh. 39, Deposition of Wayne H. Smithey ("Smithey Depo."), at 38.

Wesley contacted Science Applications International Corporation ("SAIC") (then "JRB Associates") to review the recommendations of the Marcus report. Cooney Depo. at 28. SAIC's first report, dated June 4, 1984, reviewed Marcus' recommendations, agreed with many of them including that Wesley's first priority should be to remove the already damaged areas of the ceilings, but advised that many ceilings did not need to be replaced because a "good management program" would provide adequate protection from potential release of airborne asbestos fibers. Pl. Exh. 40; Pl. Exh. 41, Deposition of Ching K. Chen ("Chen Depo."), at 55.

In response to the Marcus and SAIC reports and its own plans for building renovation, Wesley undertook

three phases of removal. Phases one and two were undertaken as part of Wesley's renovation project, *see* Defs. Exh. 8 (Facilities Planning Recommendations Report), and not because of the presence of asbestos, Cooney Depo. at 44, 220, 324; Lewis Depo. at 57, but in carrying out the renovations Wesley recided to remove ceilings that would be disturbed. Cooney at 80, 328-29; Lewis Depo. at 58. Wesley intends eventually to remove all ceilings that contain asbestos. Cooney Depo. at 98.

Wesley conducted the "first phase" of removal from December 13, 1984 through January 11, 1985. SAIC monitored the removal project and reported that Wesley employees, students, and other users had not been exposed to hazardous levels of airborne asbestos fibers. Defs. Exh. 2 (Report of January 19, 1985).

The "second phase" of abatement was undertaken from June 24 through July 10, 1985. SAIC again monitored the work sites and found that the public and Wesley employees had not been exposed to hazardous levels of airborne fibers during removal. Defs. Exh. 3 (Report of November 12, 1985).

In January 1987, SAIC conducted a general air monitoring survey in the Wesley buildings. SAIC found that the airborne fiber levels in the three Wesley buildings studied were in the "range of normal background levels" and "based on these data, Wesley employees, students, and other occupants have not been exposed to hazardous levels of airborne asbestos fibers." Defs. Exh. 1 (Report of March 16, 1987), at 1-1.

The "third phase" of removal was scheduled for May 5 through June 1, 1987. Cooney Depo. at 43.

Wesley planned each of the removal periods to coincide with vacation periods, and occupation of the Wesley buildings has not been disrupted due to abatement efforts except for temporary dislocation of some students, staff, and offices during removal periods. *See* Cooney Depo. at 145.

Prior to filing this action on May 17, 1985, Wesley did not communicate with defendants about their asbestos products in its buildings or any related risks. Defs. Exh. 5 (Pl. Answer No. 31); Defs. Exh. 11 (Pl. Response No. 6).

Until recently, Wesley had not asserted that any person had claimed or had suffered any physical injury caused by exposure to the asbestos in the ceilings of its buildings. Defs. Exh. 5 (Pl. Answer Nos. 37 and 47); Cooney Depo. at 264. However, in July 1987, two long-time employees of plaintiff, Caroline and Robert Green, were found to have "minimal but definite signs of asbestos related disease." Pl. Exh. 1 to Plaintiff's Motion for Leave to Designate Additional Expert.[4]

With these essential facts in mind, the Court next proceeds to examine the numerous issues raised by the parties' motions for summary judgment.

II. Analysis

A. Standards for Summary Judgment

Sumary judgment is appropriate where there is "no genuine issue as to any material fact." Fed. R. Civ. P. 56. In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2513 (1986). At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answer to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986).

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[4] The Court allowed plaintiff's motion to designate the Greens' examining physician as an additional expert witness, extended discovery by one month, and rescheduled the pretrial and trial dates. Orders of Aug. 18 and Sept. 3, 1987.

As a threshold issue, defendants object to a significant amount of the "evidentiary material" that plaintiff has submitted in opposition to the joint motion. Essentially, these documents relate internal corporate decisionmaking by defendants and other asbestos manufacturers from the 1930s through the 1970s, which, according to plaintiff, demonstrate that defendants deliberately ignored or concealed information from consumers about the adverse effects of asbestos. *See* Pl. Opp. at 2-13 and Pl. Exh. 3-16, 19-28, 31.

In opposing the motion for summary judgment, plaintiff need not submit evidence in a form that would be admissible at trial. *Celotex*, 106 S. Ct. at 2553. While "normally" the showing is based on the evidentiary materials listed in Rule 56(c), *i.e.*, "pleadings, depositions, answers to interrogatories, and admisions on file, [and] affidavits, if any," the Court may consider other documents and information. Here, although defendants contend that the documents should not be considered unless a proper foundation is laid, at this stage, they have neither challenged the authenticity nor the credibility of the documents submitted by plaintiff. Accordingly, the Court shall not exclude these documents from consideration, giving them the weight they deserve.

B. Statute of Repose

Defendants jointly move for summary judgment as to plaintiff's tort claims[5] on the basis that the District of Columbia statute of repose, D.C. Code § 12-310, expressly requires plaintiff to have brought this action within ten years of the installation of defendants' products. Even granting plaintiff the full benefit of the three-year stat-

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[5] The protections afforded to defendants by the statute of repose do not apply to plaintiff's claims based on breach of contract and governed by D.C. Code § 28:2-725. As discussed below, defendants have challenged these causes of action on separate grounds.

ute of limitations, D.C. Code § 12-301,[6] defendants argue that recovery in tort is precluded for buildings finished thirteen years prior to the filing of this action, *i.e.*, May 17, 1972, well after the completion of the Wesley buildings at issue.[7]

The District of Columbia statute of repose bars claims "resulting from the defective or unsafe condition of an improvement to real property" unless "injury occurs within the ten-year period beginning on the date the improvement was substantially completed." D.C. Code § 12-

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[6] The 1986 amendments to section 12-301, *see infra*, extend the statute of limitations to five years and allow plaintiffs to use the discovery rule in asbestos/real property actions. D.C. Code § 12-301(10). These provisions were also made retroactive to cases pending as of July 1, 1986. Pl. Exh. 5 (D.C. Law § 6-261 (Jan. 8, 1987)). As the statute of limitations at most operates to extend the repose period, this amendment would allow Wesley to sue for buildings constructed beginning in 1970, still ten years after the completion of the buildings at issue and outside the repose period.

[7] The parties do not dispute that the Wesley completed the buildings at issue here long before 1972. Construction was finished by 1961 and certificates of occupancy for the buildings involved were issued beginning in 1959 and ending in 1970. Defs. Joint Motion on Statute of Repose, Exh. C.

Plaintiff argues that even if the statute of repose period applies, however, that the period is tolled by concealment of the defects by defendants and that this is a question for the jury. The plain language of section 12-310 is to the contrary and the courts in this jurisdiction have not applied principles of equitable tolling to statutes of repose.

The period runs solely from the date of the construction or improvement. *District of Columbia v. Owens-Corning*, No. 14128-84, slip op. at 9 (D.C. Sup. July 27, 1987) (under D.C. Code § 12-310, time within which action must be brought is entirely unrelated to the accrual of a cause of action through injury or its discovery); *see also Bussineau v. President and Directors of Georgetown College*, 518 A.2d 423, 436 (D.C. App. 1986); *cf. Emmett v. Eastern Dispensary and Casualty Hospital*, 396 F.2d 931, 936 (D.C. Cir. 1967) *and Canton Lutheran Church v. Sovik, Mathre, Sothrum & Quanbeck*, 507 F. Supp. 873, 878-80 (D.S.D. 1981).

310. As manufacturers and suppliers of construction materials, defendants are protected by the statute. *J.H. Westerman Co. v. Firemen's Fund Insurance Co.*, 499 A.2d 116 (D.C. 1985); *Britt v. Schindler Elevator Corp.*, No. 86-0019 (D.D.C. Aug. 27, 1986).[8]

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[8] Plaintiff argues that, even if the former version of the statute of repose applies, a genuine issue of fact is raised as to whether defendants' acoustical plaster is "an improvement to real property" within the meaning of section 12-310. An examination of the legislative history of the 1986 amendments, whose protection plaintiff now seeks, leads to the opposite conclusion.

Until the 1986 amendments, manufacturers and suppliers were found to be covered by the statutes of repose's "improvement to real property" language. *See J.H. Westerman Co. v. Fireman's Fund Ins.*, 499 A.2d 116 (D.C. App. 1985). While *Westerman* involved the application of the statute of repose to the manufacturer of a built-in heating system, the court's analysis applies with equal force to the manufacturers and suppliers of acoustical plaster.

The court first examined the plain language of section 12-310, finding that it was "broad and far-reaching" and that "[i]f the action emanates from an improvement, that language protects all parties involved in its design, manufacture, or installation." 499 A.2d at 120. The legislative history of the statute, though inconclusive, indicated that Congress intended to leave open the protected class. *Id.* The court lastly looked to the policy behind the statute and found that manufacturers were protected because "manufacturers, just as architects and engineers, 'have no control over an owner whose neglect in maintaining an improvement may cause dangerous or unsafe conditions to develop over a period of years.'" *Id.* at 121.

While the court recognized that the "overwhelming majority" of other states' statutes of repose had been interpreted to exclude manufacturers and suppliers not otherwise involved in the design of the particular improvement, the District of Columbia statute was much broader. *Id.* (Plaintiff's citation to a case in another jurisdiction finding manufacturers outside the statute of repose, even though it specifically involved one of the defendants in this case, *Cinnaminson Township Bd. of Educ. v. U.S. Gypsum*, 552 F. Supp. 855, 863 (D.N.J. 1982), is therefore unpersuasive.)

Further confirmation of the conclusion that defendants are protected by the statute comes from the legislative history of the 1986 amendments, which indicates that the District of Columbia

About one month after defendants filed their joint motion on this issue, significant amendments were made to the District of Columbia's statute of repose effective February 27, 1987. Statute of Limitations Amendment Act of 1986, D.C. Code § 12-310 (Pl. Exh. 5 to Pl. Motion for Partial Summary Judgment). The amendments specifically provide that the statute of repose no longer applies to "any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property." D.C. Code § 12-310(3) (1987). Plaintiff seeks summary judgment on the basis that these amendments, which apply to actions pending on July 1, 1986, essentially revived Wesley's tort causes of action. In response, defendants challenge the validity of retroactive application of the 1986 amendments on several grounds.[9]

According to defendants, the statute of repose granted them substantive rights of immunity from suit that vested in defendants thirteen years after substantial completion of the Wesley buildings (*i.e.*, approximately in 1974),

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Council deliberately enacted new section 12-310(3) to overrule *Westerman* and bring the District of Columbia in line with other jurisdictions by specifically exempting actions brought against manufacturers and suppliers from the statute of repose. *See* Legal Analysis accompanying the Statute of Limitations Amendment Act of 1986, Defs. Exh. 12 at 3.

Whether defendants are protected by the statute of repose, therefore, turns ultimately on this Court's determination of the validity of retroactive application of the 1986 amendments in face of defendants' constitutional challenge and not on any uncertainty over the scope of the language of the statute. If the 1986 amendments can be retroactively applied, subsection (3) deprives defendants of their previous protection. If the original statute applies, then defendants are protected under the rationale of *Westerman*. *See Owens-Corning*, slip op. at 2 (Feb. 3, 1987) (Defs. Reply, Exh. A) (court announces it will follow *Westerman* as a guide to "any questions about 'improvements' ").

[9] The issue before the Court is whether the 1986 amendments can be *retroactively* applied. The Court need not, and does not, determine the validity of prospective application.

and retroactive application of the amendments to the statute of repose violates their constitutional rights of due process and equal protection.[10]

A review of the case law validates defendants' position. Plaintiff argues only that statutes of *limitation* do not create vested rights and therefore may be retroactively applied without violating due process.[11] But statutes of

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[10] Defendants discuss in their memorandum two District of Columbia cases holding unconstitutional legislative attempts to affirmatively divest plaintiffs of their common law rights. *Barrick v. District of Columbia*, 173 A.2d 372, 375 (D.C. App. 1961), *aff'd sub nom. Swenson v. Barrick*, 302 F.2d 927 (D.C. Cir. 1962) (statute increased burden of proof for plaintiffs suing employees of the District of Columbia); *Gibbs v. District of Columbia*, 180 A.2d 891 (D.C. App. 1962) (statute at issue in *Barrick* could not be retroactively applied). As defendants acknowledge, they would like this Court to accept the "inverse" proposition of *Barrick* and *Gibbs*, *i.e.*, that legislation cannot divest defendants of an affirmative *defense*.

Defendants also argue that the amendments are unconstitutional because they are (1) arbitrary and irrational, (2) deny defendants equal protection of the laws because they immunize architects and installers but not manufacturers and suppliers, and (3) are manifestly unjust. The Court does not reach these issues as it finds that the statute may not be retroactively applied without effecting a deprivation of due process.

[11] Plaintiff relies on *Nelson v. Flintkote*, 218 Cal. Rptr. 562, 172 Cal. App. 3d 727 (Cal. App. 1985); *Puckett v. Johns-Manville Corp.*, 215 Cal. Rptr. 726, 169 Cal. App. 3d 1010 (Cal. App. 1985); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Hymowitz v. Eli Lilly and Co.*, No. 24761-86 (Sup. Ct. N.Y. July 21, 1987). These cases all involved statutes of limitation and, for the reasons discussed below in this Opinion, are inapposite.

The statute of repose cases cited by plaintiff, *Murphee v. Raybestos Manhattan*, 696 F.2d 459 (6th Cir. 1982); *Magone v. Raymark Industries*, No. 84-4158 (E.D. Pa. Jan. 30, 1987) (Pl. Exh. 50) do not comport with the law of this jurisdiction.

Correspondingly, plaintiff's side argument that defendants could not have "vested" rights for buildings built in 1961 and earlier because the statute of repose did not yet then exist is meritless because the legislature can retroactively create rights. Wesley's

repose are quite different than statutes of limitation in the eyes of the law. While the latter are considered procedural, the former are recognized as substantive. This characterization in turn determines whether retroactive application is consistent with due process.

In the only case addressing the nature of the rights created by D.C. Code § 12-310, the United States District Court for the District of Maryland, deciding a conflicts of laws question, found the District of Columbia statute of repose to be substantive because it conferred rights upon those who improve real property. *President and Directors of Georgetown College v. Madden*, 505 F. Supp. 557 (D. Md. 1980), *aff'd in relevant part*, 660 F.2d 91 (4th Cir. 1981). The court reasoned that the statute of repose "does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. . . . The injured party literally has *no* cause of action. . . . The function of the statute is thus rather to define substantive rights than to alter or modify a remedy." 505 F. Supp. at 573 (citing *Rosenberg v. Town of North Bergen*, 293 A.2d 662, 666-67 (N.J. 1972)).

Under the reasoning of *Madden*, repeal of section 12-310 cannot be made retroactive because it conferred substantive rights on defendants. In the only case in this jurisdiction to address this specific issue, the Superior Court for the District of Columbia reached this same conclusion.[12] *District of Columbia v. Owens-Corning Fi-*

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argument that *it* somehow acquired vested rights against defendants upon construction is a novel theory without support.

[12] Courts in Virginia and South Carolina have reached a similar conclusion. *See School Board of The City of Norfolk v. United States Gypsum Co.*, No. 870265 (Sup. Ct. Va. Sept. 4, 1987) (on question certified from the United States District Court for the Eastern District of Virginia, the court found unconstitutional the state legislature's attempt in 1986 to revive actions involving removal of asbestos brought by municipal, charitable, and educa-

berglass Corp., No. 14128-84 (Sup. Ct. D.C. July 27, 1987). In that case brought by the District of Columbia government against manufacturers and suppliers of asbestos products that had been used in District of Columbia schools, Judge Wolf held that D.C. Law § 6-202 amending section 12-301 may not be constitutionally or fairly applied retroactively. While much of the court's ruling focused on the unabashed attempt by the District of Columbia to clear the way for its own major lawsuit against asbestos products manufacturers,[13] the court's analysis of the nature of the rights created by section 12-310 is directly on point and persuasive. Relying on *Madden*, the court emphasized that, unlike a statute of limitation, a statute of repose prevents what otherwise might be a cause of action from ever arising and that it defines substantive rights rather than alters or modifies a remedy. Slip op. at 9 (citing *Madden*, 505 F. Supp. at 570-75). Defendants in that case had therefore "acquired a grant of immunity from suit when the 13-year period passed from the date a building or improvement was completed," and Judge Wolf found that the statute of repose could not fairly be changed retroactively. *Id.* at 9-10.

Unless and until the District of Columbia Court of Appeals holds otherwise in the appeal of *Owens-Corning*,[14]

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tional institutions that had been precluded by the state's five-year statute of repose); *Colony Hill Condominium Ass'n v. Colony Co.*, 70 N.C. App. 390, 320 S.E. 2d 273, 276 (N.C. App. 1984).

[13] *See Owens-Corning*, slip op. at 2-9. The court characterized as manipulative the actions of the District of Columbia government, which when faced with "some troublesome motions filed in 1986" it proceeded to do "what no other litigant can do—it changed the rules in its favor after the battle had been joined." *Id.* at 7-8. The court noted that "the court's ruling herein is not based solely on constitutional deprivation without due process of law of property rights. It is also based on manifest injustice, separation of powers—and yes, fairness." *Id.* at 12.

[14] Sitting in diversity, this Court must look to the law of the forum jurisdiction. *Owens-Corning* is unquestionably that law,

the law is clear that defendants here are entitled to summary judgment on this issue. Retroactive application of the 1986 amendments to the District of Columbia statute of repose to defendants effects an unconstitutional deprivation of due process. While this ruling requires dismissal of that part of plaintiff's case based on tort (and precludes the Court from addressing the other arguments raised by defendants such as whether plaintiff can recover for purely economic loss), under the express language of section 12-310(b)(1), plaintiff may still proceed in this case, if otherwise permitted, on its theory of breach of express or implied warranty.

C. Breach of Warranty

Defendants challenge plaintiff's breach of warranty claims on two grounds: that plaintiff did not provide them the required notice and that the statute of limitations has run on plaintiff's claims.

1. Notice

Defendants contend that plaintiff's breach of warranty claim is barred for failure to provide notice under D.C. Code Ann. § 28:2-607(3)(a), which provides that a "buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."

Plaintiff admits that it did not communicate with either defendant at any time prior to commencing this action with respect to the possible defects or hazardous conditions of defendants' products or its intent to remove them from its buildings and seek compensation. Plaintiff argues, however, that failure to do so does not bar this cause of action. The Court agrees.

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but the Court cannot leave unnoticed that Judge Wolf, on October 26, 1987, certified this question to the District of Columbia Court of Appeals for interlocutory appeal.

The notice requirement of section 2-607 cannot be read as strictly as defendants suggest. Although the decision of the *Owens-Corning* court on this same issue is complicated and its reasoning not well-evident to those unfamiliar with the complex facts of that case, the court indicates that, although separate notice is required under section 2-607, constructive notice can be sufficient. Slip op. at 3-4 (Def. Exh. 10). As to buildings for which the District of Columbia learned of the asbestos after January 17, 1980 (three years prior to the filing by the plaintiff of related litigation in Pennsylvania) the timeliness and sufficiency of notice was a mixed question of law and fact precluding summary judgment. *See also Palmer v. A.H. Robbins Co., Inc.*, 684 P.2d 187, 207 n.3 (Colo. 1984) (no prescribed form of notice required); *cf. Oden & Sims Used Cars, Inc. v. Thurman*, 301 S.E. 2d 673 (Ga. 1983) (notice need not be in writing, but seller must be aware of allegations of breach not merely facts).

Plaintiff has easily demonstrated that there is a genuine issue of material fact as to constructive notice. U.S. Gypsum had received numerous inquiries as to potential health hazards of its asbestos-containing products, Pl. Exh. 44, Bowman Depo., at 26, and several educational institutions had sought information from defendant National Gypsum specifically as to Sprayolite's content, attendant risks, and removal procedures. Pl. Exh. 45. Drawing all reasonable inferences in plaintiff's favor, *Anderson*, 106 S. Ct. at 2513, the Court cannot find that constructive notice was so wholly inadequate to allow summary judgment on this issue.

Furthermore, section 2-607 provides that notice must be given within a reasonable time after the buyer discovers "or *should have discovered* any breach." (Emphasis added.) The plain language of the statute thus contemplates the occurrence of latent defects and duly extends the period for notice. This objective standard presents

other questions of fact that must remain for the jury's determination.

In addition, where a seller wilfully fails to disclose a defect, the defense of failure to give notice cannot be raised. *See United California Bank v. Eastern Mountain Sports*, 546 F. Supp. 945, 960 (D. Mass. 1982), *aff'd*, 705 F.2d 439 (1st Cir. 1983) (timely notice not required where seller failed to disclose breach in bad faith, knowing that goods were defective and would never be acceptable to buyer if the true facts were known). While it remains for trial whether defendants in this case knew that their products were hazardous or defective and wilfully failed to disclose such facts, plaintiff has sufficiently shown that a genuine issue of material fact is raised on this point to preclude summary judgment in defendants' favor.

The Court is persuaded that the policies underlying section 2-607 are well-served by finding that plaintiff was not obligated under these circumstances to communicate their specific claims to defendants. Defendants contend that, because of the absence of notice, they have been deprived of the opportunity to participate in or contribute to plaintiff's decision on how to abate the alleged hazard and to have their experts evaluate the asbestos materials to analyze product identification and the propriety of specification and maintenance. In light of the record thus far developed in this case, this argument is quite unpersuasive. Defendants have carefully avoided representing that they actually would have undertaken any of these responsive actions had there been specific notice by Wesley. Defendants' response to the multiple inquiries by other institutions about similar problems indicates, at minimum, recalcitrance rather than benevolence. While such direct notice should, of course, be encouraged, under the circumstances of this case, the Court cannot grant defendants' motion requesting a conclusive finding that notice was provided.

2. Statute of Limitations

Defendants further argue that plaintiff's action is time-barred under this jurisdiction's three-year statute of limitations governing actions for breach of contract for sales of goods. D.C. Code § 28:2-725(1).[15] Under the general statute of limitations in the District of Columbia, an action for breach of contract, including breach of warranty, runs from the time of the breach. *Sears, Roebuck and Co. v. Goudie*, 290 A.2d 826, 830 (D.C. App.), *cert. denied*, 409 U.S. 1049 (1972); *Western Union Telegraph Co. v. Massman Construction Co.*, 402 A.2d 1275, 1277 (D.C. App. 1979); *Prouty v. National Railroad Passenger Corp.*, 572 F. Supp. 200 (D.D.C. 1983). If the claim is based on fraudulent concealment, however, the period runs from the discovery of the breach. *Poole v. Terminix Co. of Maryland and Washington, Inc.*, 200 F.2d 746 (D.C. Cir. 1952); *see also Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1203 (D.C. App. 1984).

Defendants suggest that this action, brought more than twenty years after the completion of construction of the buildings, is clearly time-barred. This argument assumes, however, that the breach occurred upon installation of defendants' product and turns on whether plaintiff's claims of fraud survive summary judgment. Thus, while plaintiff's fraud and misrepresentation claims are barred as independent causes of action by this Court's ruling above on the statute of repose, these same factual allegations must be analyzed at this point to resolve this aspect of plaintiff's claims for breach of contract.

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[15] Section 28:2-725(4) actually provides for a four-year statute of limitations, but the general three-year statute of limitations at section 12-301 of the D.C. Code for actions for breach of contract, including breach of warranty, applies to causes of action accruing prior to 1965. *Sears, Roebuck, and Co. v. Goudie*, 290 A.2d 826, 830 (D.C. App.), *cert. denied*, 409 U.S. 1049 (1972); *Hoffa v. Fitzsimmons*, 673 F.2d 1345 (D.C. Cir. 1982). The Court does not decide at this juncture specifically when the cause of action accrued in this case. The difference here is inconsequential.

To prove fraud in this jurisdiction, a plaintiff must establish by clear and convincing evidence that (1) there was a false representation of material fact, (2) such false representation was knowingly made with an intent to deceive, (3) action was taken by plaintiff in reliance upon the alleged misrepresentation, and (4) plaintiff has provable damages as a result of the alleged fraud. *Pyne v. Jamaica Nutrition Holdings, Ltd.*, 497 A.2d 118, 131 (D.C. App. 1985); *Dresser v. Sunderland Apartments Tenants Association, Inc.*, 465 A.2d 835 (D.C. App. 1983). Nondisclosure of material information may constitute fraud. *Pyne*, 497 A.2d at 131.

Plaintiff alleges in the complaint that defendants have made false or untrue statements about the safeness and fitness of their product for school buildings and that plaintiff relied on these statements. Complaint, paras. 20-22. Plaintiff also argues that the record shows that defendants knew their products were "extraordinarily dangerous and deliberately concealed this fact" from the architect and other consumers. Pl. Opp. at 30.

Plaintiff admits there are no communications or documents relating to representations made by defendants specifically to Wesley about their products, Defs. Exh. 5 (Pl. Answer No. 31); Defs. Exh. 11 (Pl. Response No. 18), but submits that such representations were implied. Plaintiff has submitted enough evidentiary material to at least raise a genuine issue of material fact in this regard. For example, even though the architect of the Wesley buildings did not recall any specific representations by defendants regarding the safety of their products for the Wesley project, defendants' sales representatives routinely visited his office to discuss their products and to provide him with information. Fink Depo. at 24-25. The architect also relied in his product selection on *Sweets Catalog*, a trade publication in which the defendants advertised and displayed information about their products. The information about the defendants' products in *Sweets*

does not mention that they contain asbestos. *Id.* at 25-26. In addition, as discussed above, plaintiff has submitted evidence indicating that defendants generally suppressed adverse information about their asbestos products from inquiring consumers.

On the whole then, drawing all reasonable inferences in favor of plaintiff, *Anderson*, 106 S. Ct. 2513, the genuine issues of material fact raised as to fraud and misrepresentation preclude the granting of summary judgment on the statute of limitations issue as to plaintiff's breach of warranty claim.

D. Conspiracy or Concert of Action

Defendants also request summary judgment on plaintiff's conspiracy or concert of action "counts," which allege that defendants did not reveal to consumers the hazardous nature of their asbestos products.

A plaintiff can allege civil conspiracy as a means of establishing vicarious liability for an *intentional* tort, *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1012 (D.S.C. 1981), but civil conspiracy is not an "independently actionable tort." *Waldon v. Covington*, 415 A.2d 1070, 1074 n.14 (D.C. 1980); *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983) ("liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable"). Further, the concept of concert of action is subsumed under the principle of civil conspiracy. *Halberstam*, 705 F.2d at 477.

Acordingly, as this Court has ruled above that plaintiff cannot proceed on its tort claims, the dependent allegations of concert of action and civil conspiracy are also barred.

E. Punitive Damages

In contract actions, punitive damages will not lie "even if it is proved that the breach was willful, wanton, or

malicious." *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. App. 1982), *cert. denied*, 459 U.S. 912 (1982). Punitive damages will be awarded only where the breach "merge[s] with and assume[s] the character of a willful tort." *Id.* Once again, while plaintiff's tort claims have been dismissed for procedural reasons, the factual allegations made therein are relevant on this issue of contract law and cannot be resolved on summary judgment.

According to plaintiff, the evidence will show that defendants suppressed information about the hazards of their asbestos products.[16] Plaintiff contends that defendants deliberately refused to heed the results of the scientific research it underwrote and deceived the public in the interest of making profit.[17]

The Court finds that because genuine issues of material fact are raised as to fraud or misrepresentation, whether the alleged breach of contract might be considered to be so willful as to merge with the tort is a question for the jury. Accordingly, summary judgment on the issue of punitive damages is precluded.

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[16] Plaintiffs also acknowledge that, because the defendants are corporations, it must prove that the corporation participated in the wrongful act through its officers and directs or that they subsequently ratified or authorized the conduct. *Woodard v. City Stores, Co.*, 334 A.2d 189, 191 (D.C. 1967); *see also Franklin Investment Co. v. Smith*, 383 A.2d 355, 358-89 (D.C. 1978).

[17] Plaintiff points to other cases where punitives have been assessed against the defendants. *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559, 566 (D.S.C. 1986), *aff'd*, 827 F.2d 975 (4th Cir. 1987); *Mercer University v. National Gypsum Co.*, No. 85-126-3 (D. Ga. Aug. 26, 1986) (Pl. Exh. 47); *Independence School District v. U.S. Gypsum Co.*, No. 84-05334 (Cir. Ct. Jackson Co. Miss. 1986). The award of punitive damages in the instant case, of course, is for the jury's determination after it hears all the evidence and is not controlled by the jury decisions in these cases.

III. Conclusion

For the reasons set forth above, summary judgment is granted as to the application of the District of Columbia statute of repose to plaintiff's tort claims and denied as to plaintiff's claims for breach of contract and punitive damages.

The pretrial of March 7, 1988 at 9:15 a.m. and the jury trial to last for an estimated three weeks commencing on April 18, 1988 at 10:00 a.m., remain as previously scheduled.

IT IS SO ORDERED.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

January 4, 1988

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT V

No person shall be . . . deprived of life, liberty or property without due process of law.

DISTRICT OF COLUMBIA CODE SECTION 12-310

§ 12-310. Actions arising out of death or injury caused by defective or unsafe improvements to real property.

(a) (1) Except as provided in subsection (b), any action—

(A) to recover damages for—

(i) personal injury,

(ii) injury to real or personal property, or

(iii) wrongful death,

resulting from the defective or unsafe condition of an improvement to real property, and

(B) for contribution or indemnity which is brought as a result of such injury or death,

shall be barred unless in the case where injury is the basis of such action, such injury occurs within the ten-year period beginning on the date the improvement was substantially completed, or in the case where death is the basis of such action, either such death or the injury resulting in such death occurs within such ten-year period.

(2) For purposes of this subsection, an improvement to real property shall be considered substantially completed when—

(A) it is first used, or

(B) it is first available for use after having been completed in acordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement,

whichever occurs first.

(b) The limitation of actions prescribed in subsection (a) shall not apply to—

(1) any action based on a contract, express or implied, or

(2) any action brought against the person who, at the time the defective or unsafe condition of the improvement to real property caused injury or death, was the owner of or in actual possession or control of such real property.

(Oct. 27, 1972, 86 Stat. 1275, Pub. L. 92-579, § 1(a); 1973 Ed., § 12-310.)

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. Law 6-202

"D.C. Statute of Limitations Amendment Act of 1986".

Pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P. L. 93-198, "the Act", the Council of the District of Columbia adopted Bill No. 6-510 on first and second readings, November 25, 1986 and December 16, 1986, respectively. Following the signature of the Mayor on January 8, 1987, this legislation was assigned Act No. 6-261, published in the January 23, 1987, edition of the *D.C. Register*, (Vol. 34 page 527) and transmitted to Congress on January 13, 1987 for a 30-day review, in accordance with Section 602 (c) (1) of the Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional Review Period has expired, and therefore, cites this enactment as D.C. Law 6-202, effective February 28, 1987.

/s/ David A. Clarke
DAVID A. CLARKE
Chairman of the Council

Dates Counted During the 30-day Congressional Review Period:

January 13, 14, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 30

February 2, 3, 4, 5, 6, 9, 10, 11, 17, 18, 19, 20, 23, 24, 25, 26, 27

AN ACT

D.C. ACT 6-261

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Jan. 8, 1987

To amend sections 12-301 and 12-310 of the District of Columbia Code to make these sections inapplicable to the District of Columbia government and to provide special limitation provisions governing actions for injury or death caused by exposure to asbestos.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "District of Columbia Statute of Limitations Amendment Act of 1986".

Sec. 2. (a) The table of contents for title 12 is amended to read as follows:

"3. Limitation of Actions. . . . Sections 12-301 to 12-311.".

(b) The table of contents for Chapter 3 of title 12 is amended by adding the following after the heading for section 12-310:

"12-311. Actions arising out of death or injury caused by exposure to asbestos.".

Sec. 3. Section 12-301 of the District of Columbia Code is amended:

(a) By adding a new subsection (10) to read as follows:

"(10) for the recovery of damages for an injury to real property from toxic substances including products

containing asbestos—5 years from the date the injury is discovered or with reasonable diligence should have been discovered.";

(b) By striking the period at the end of the last sentence and inserting in its place ", nor to actions brought by the District of Columbia government.".

Sec. 4. Section 12-310 of the District of Columbia Code is amended:

(a) By striking the period after the last word of the section and inserting in its place ", or (3) any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, or (4) any action brought by the District of Columbia government.".

Sec. 5. Title 12, Chapter 3 of the District of Columbia Code is amended by adding a new section 12-311, to read as follows:

"Sec. 12-311. Actions arising out of death or injury caused by exposure to asbestos.

"(a) In any civil action for injury or illness based upon exposure to asbestos, the time for the commencement of the action shall be the later of the following:

"(1) Within one year after the date the plaintiff first suffered disability; or

"(2) Within one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that the disability was caused or contributed to by the exposure.

"(b) "Disability" as used in subsection (a) of this section means the loss of time from work as a result of the exposure that precludes the performance of the employee's regular occupation.

"(c) In an action for the wrongful death of any plaintiff's decedent, based upon exposure to asbestos, the time

for commencement of an action shall be the later of the following:

"(1) Within one year from the date of the death of the plaintiff's decedent; or

"(2) Within one year from the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by the exposure.".

Sec. 6. This action shall apply to actions pending in a court on July 1, 1986, and to actions filed in a court after July 1, 1986.

Sec. 7. This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)).

/s/ David A. Clarke
Chairman
Council of the
District of Columbia

/s/ Marion Barry
Mayor
District of Columbia

Approved: 1-8-87

TABLE OF STATE STATUTES OF REPOSE AND STATE REVIVAL STATUTES

Forty-four states have some form of statute of repose and/or a revival statute. There are 14 states with products liability repose statutes, 22 states with medical malpractice repose statutes, 33 states with design and construction repose statutes, 4 states with miscellaneous statutes of repose, and 8 states with revival statutes.

Products Liability Statutes of Repose

Ariz. Rev. Stat. Ann. § 12-551; Colo. Rev. Stat. § 13-80-107(1)(b); Conn. Gen. Stat. Ann. § 52-577a; Fla. Stat. Ann. Ch. 7 §95-031; Ga. Code Ann. § 51-1-11(b)(2); Ill. Rev. Stat. Ch. 110 para. 113-213; Ind. Code Ann. § 33-1-1.5-5; Kan. Stat. Ann. § 60-3303; Ky. Rev. Stat. Ann. § 411.310; Neb. Rev. Stat. § 25-224(2); N.C. Gen. Stat. § 1-50(6); Or. Rev. Stat. § 30.905(1); Tenn. Code Ann. § 29-28-103; Wash. Rev. Code Ann. § 7.72.060

Medical Malpractice Statutes of Repose

Ark. Stat. Ann. § 15-56-112; Calif. Civ. Pro. § 337.1 & .15; Colo. Rev. Stat. § 13-80-104; Conn. Gen. Stat. Ann. § 52-584(a); Ga. Code Ann. § 9-3-71(b); Ill. Rev. Stat. Ch. 110 para. 13-212; Iowa Code § 614.1.9; Md. Cts. & Jud. Proc. § 5-109; Mass. Gen. Laws Ann. Ch. 260 § 4; Mich. Comp. Laws Ann. § 600.5838a(2); Mo. Rev. Stat. § 516.105; Mont. Code Ann. § 27-2-205; N.Y. Civ. Proc. L. & R. § 214-a (McKinney); N.C. Gen. Stat. § 1-15(c); Or. Rev. Stat. § 12.110(4); S.C. Code Ann. § 15-3-545; S.D. Code Ann. § 15-2-14.1; Tenn. Code Ann. § 29-26-116; Tex. Civ. Prac. & Rem. Code § 16.008 & .009; Utah Code Ann. § 78-14-4; Vt. Stat. Ann. tit. 12 § 521; Wash. Rev. Code Ann. § 4.16.350

Design and Construction Statutes of Repose

Conn. Gen. Stat. Ann. § 52-584(a); Del. Code Ann. tit. 10 § 8127; Ga. Code Ann. § 9-3-51; Haw. Rev. Stat. § 647-8; Idaho Code § 5-241; Ill. Rev. Stat. Ch. 110 para.

13-214; Ind. Code Ann. § 34-4-20-2; Iowa Code § 614.1.11; La. Rev. Stat. Ann. § 9:2772; Me. Rev. Stat. Ann. tit. 14, § 752; Md. Cts. & Jud. Proc. § 5-108; Mass. Gen. Laws Ann. Ch. 260 § 2B; Mich. Comp. Laws Ann. § 600.5839; Minn. Stat. Ann. § 541.051; Miss. Code Ann. § 15-1-14; Mo. Rev. Stat. § 516.097; Mont. Code Ann. § 27-2-208; Neb. Rev. Stat. § 25-223; Nev. Rev. Stat. § 11.203, .204 & .205; N.J. Stat. Ann. § 2A:14-1.1; N.M. Stat. Ann. § 37-1-27; N.C. Gen. Stat. § 1-50(5); N.D. Cent. Code § 28-01-44; Ohio Rev. Code Ann. § 2305.131; Or. Rev. Stat. § 12.135.1; 42 Pa. Cons. Stat. Ann. § 5536; R.I. Gen. Laws §9-1-29; S.D. Codified Laws Ann. § 15-2A-3; Tenn. Code Ann. § 28-314; Utah Code Ann. § 78-12-25.5; Va. Code Ann. § 8.01-250; Wash. Rev. Code Ann. § 4.16.310; W.Va. Code § 55-2-69.

Miscellaneous Statutes of Repose

Neb. Rev. Stat. § 25-222 (professional services); Or. Rev. Stat. § 12.115 (negligence); 42 Pa. Cons. Stat. Ann. § 5537 (surveyor's negligence), & § 5538 (landscape architecture's negligence); S.D. Codified Laws Ann. § 15-2-14.2 (legal malpractice).

Revival Statutes

Conn. Gen. Stat. Ann. § 52-577a(e); Ind. Code Ann. § 33-1-1.5-5.5; Mass. Gen. Laws Ann. Ch. 260 § 2C; Minn. Stat. Ann. § 541.22 subdivision 2; Neb. Rev. Stat. § 25-224(5); N.Y. Civ. Proc. L. & R. § 214-C (McKinney); N.D. Cent. Code § 28-01.102(4); Tenn. Code Ann. § 29-28-103(b).

No. 89-777

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES GYPSUM COMPANY,

Petitioner,

v.

THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH IN OPPOSITION

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BRIEF OF RESPONDENT THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH IN OPPOSITION

Respondent, The Wesley Theological Seminary of the United Methodist Church ("Wesley"), respectfully asks that the petition for a writ of certiorari sought by United States Gypsum Company ("USG") to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered May 19, 1989 be denied.

COUNTERSTATEMENT OF THE CASE

This is an asbestos property damage action brought by Wesley, a nonprofit organization located in the District of Columbia. Suit was filed in the United States District Court for the District of Columbia on May 17, 1985 against, among others, USG, a Chicago-based manufacturer of asbestos-containing building products.

Wesley's complaint sought damages in tort and in contract because its buildings were contaminated by USG's asbestos-containing acoustical plaster. USG's plaster was installed in three of Wesley's buildings during its construction which was completed in 1960. In 1984, Wesley's campus was inspected by an industrial hygienist and found to be contaminated by USG's product. The hygienist recommended its removal. Wesley has removed some of this product and faces the expensive prospect of eventually removing all of it.

On December 12, 1986, USG moved for partial summary judgment, claiming that D.C. Code § 12-310 (1981) ("§ 12-310") barred Wesley's action. Section 12-310, enacted in 1972, twelve years after the construction of Wesley's campus, provides in pertinent part:

> (a)(1) Except as provided in subsection (b), any action –
>
> (A) to recover damages for –
>
> * * *
>
> (ii) injury to real or personal property, . . . resulting from the defective or unsafe condition of an improvement to real property, and
>
> (B) for contribution or indemnity which is brought as a result of such

> injury . . . , shall be barred unless in the case where injury is the basis of such action, such injury occurs within the ten-year period beginning on the date the improvement was substantially completed . . . .
>
> (2) For purposes of this subsection, an improvement to real property shall be considered substantially completed when –
>
> (A) it is first used, or
>
> (B) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.
>
> (b) The limitation of actions prescribed in subsection (a) shall not apply to –
>
> (1) any action based on a contract, express or implied, or
>
> (2) any action brought against the person who, at the time the defective or unsafe condition of the improvement to real property caused injury . . . , was the owner of or in actual possession or control of such real property.

On October 4, 1985, the District of Columbia Court of Appeals held for the first time that the protection afforded by § 12-310 extended to manufacturers and suppliers of improvements to real property. *See J.H. Westerman v. Fireman's Fund Insurance Co.*, 499 A.2d 116, 120-21 (D.C. 1985). However, on February 28, 1987, the District of Columbia Statute of Limitations Amendment Act ("the Act") became law. D.C. Law 6-202, 34 D.C.R. 527 (1987), *codified* at D.C. Code §§ 12-301, 12-310(b)(2)-(4), 12-311 (Michie Supp. 1988). The Act amended § 12-310 by

removing manufacturers and suppliers from the ambit of its protection. The Act amended § 12-310 as follows:

> (b) The limitation of actions prescribed in subsection (a) shall not apply to –
>
> * * *
>
> (3) any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property . . .
>
> * * *

The Act also amended D.C. Code § 12-301 by extending the former three-year statute of limitations for actions claiming injury to real estate. The Act created a new subsection, 301(10), a five-year statute of limitations for actions claiming injury to real estate "from toxic substances including products containing asbestos." The Act also established a new, more liberal statute of limitations for "actions arising out of death or injury caused by exposure to asbestos." D.C. Code § 12-311 (Michie Supp. 1988). *See Gwyer v. The Celotex Corp.*, ___ A.2d ___, 117 D.W.L.R. 2617 (D.C. Sup. 1989). Finally, the amendments were made applicable to all actions pending at the time the amendments took effect. *See* D.C. Code § 12-311 note (Michie Supp. 1988); D.C. Law 6-202, § 6.

On May 11, 1987, Wesley filed a motion for partial summary judgment. In that motion, Wesley maintained that under the amendments to D.C. Code §§ 12-301 and 12-310, its claims were timely as a matter of law.

On January 5, 1988, the District Court entered a partial summary judgment, dismissing all of Wesley's tort claims as time-barred under § 12-310. However, the court

determined that Wesley's contract claim was still actionable. App. 29a.*

On April 28, 1988, trial began. A jury later returned a verdict in favor of USG on Wesley's contract claim. On the same day, the District Court entered final judgment.

On June 10, 1988, Wesley filed its Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit. On appeal, Wesley maintained that the District Court decision was mistaken for two reasons: (1) the Supreme Court has consistently held that a legislature may restore a barred remedy without violating the Constitution and this rule applies to § 12-310 whether it is viewed as a procedural or a substantive provision; and (2) even if the amendments to § 12-310 are viewed as altering a substantive law by creating potential liability for past conduct, they do not violate the Constitution. *See* Brief of Appellant at 21-22. USG maintained that only changes in purely procedural provisions may be retroactive while changes in substantive ones may not. USG urged that § 12-310 was a "substantive" provision that conferred "vested rights" which could not be abrogated constitutionally. *See* Brief of Appellee at 9. The Court of Appeals reversed, holding that the retroactive application of the amendments to § 12-310 was constitutional. On August 14, 1989, the Court of Appeals denied reconsideration *en banc*.

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* Citations to "App." are to the petitioner's appendix.

REASONS WHY THE WRIT SHOULD BE DENIED

USG contends that the Court of Appeals' reversal of the District Court's ruling on the statute of repose defies precedents which constrain retroactive legislation on due process grounds and that a departure from these precedents "will create confusion in the lower courts" where similar statutes of repose (and similar amendments to such statutes) are presently being construed. *See* Petition at 12. Neither of these arguments has merit. In fact, the Court of Appeals' decision is wholly in line with the decades-old acceptance of the constitutionality of retroactive economic legislation. USG's contrary view rests on the nondispositive substantive/procedural test, a legal distinction variously considered by the courts and scholars to be abstract, metaphysical and even conclusory. USG would defend itself (and the entire asbestos industry) at the expense of the power of legislatures to act in the public interest.

I. USG's Substantive/Procedural Analysis Has No Bearing on the Constitutionality of Retroactive Economic Legislation.

USG treats the Court of Appeals' decision as if it were the watershed – a sudden and impermissible departure from the notion that substantive (as opposed to procedural) rights enjoy a special status that places them beyond the reach of legislatures. The Court of Appeals, however, hewed closely to a long tradition upholding statutes essentially identical to the Act.

In 1960 (the year in which the buildings involved in this litigation were completed), Charles B. Hochman

published *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960), an exhaustive study of the very issues at the heart of this litigation. From his survey of this Court's apposite decisions, Hochman concluded that the constitutionality of retroactive legislation is determined by the weighing of three factors:

> [1] the nature and strength of the public interest served by the statute, [2] the extent to which the statute modifies or abrogates the asserted pre-enactment right, and [3] the nature of the right which the statute alters.

Id. at 697.

In deciding the present case, the Court of Appeals gave ample consideration to each of these factors, which are clearly no less dispositive in this context than when Hochman identified them thirty years ago.

First, the Court of Appeals carefully considered the Act, noting that USG had never denied that this statute serves a rational purpose, *i.e.*, to assure "that the losses due to defects in building materials discovered long after installation should fall on the supplier rather than the building's owner."[1] App. 6a-7a. That retroactive economic

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[1] USG avers that the District of Columbia "used a variety of procedural maneuvers to make sure [that the D.C. Law 6-202] was enacted . . . ." Petition at 4, n.2. USG made no argument respecting the manner in which 6-202 became law either before the trial court or the Court of Appeals, thereby waiving its right to do so now. Moreover, USG's belated attack on this lawmaking falls short of saying that any lack of due process was involved.

legislation need merely serve a rational purpose to satisfy this aspect of due process is the unequivocal holding of the cases upon which the Court of Appeals relied, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).[2]

Second, the Court of Appeals implicitly addressed the next factor discussed by Hochman – the extent of the abrogation of the preenactment right. USG's facile resolution of this issue reduces to a comparison of "substantive rights," whose retroactive amendment violates due process, and "procedural rights," which are freely amendable. This untenable theory is the basis for the only "question presented" by USG:

> Whether a statute of repose, which grants a substantive right to be free from stale lawsuits, may be amended retroactively to revive potential liabilities that the statute had expressly extinguished.

Petition at i.

USG considers the right it formerly enjoyed under the statute of repose to be "vested," a term that Hochman and the courts consider conclusory because, as Hochman

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[2] From reading Hochman's article and the cases discussed therein, as well as the more recent *Turner Elkhorn* and *Gray*, it is evident that in the past quarter century this Court has become increasingly reluctant to second-guess a legislature's understanding of how best to serve the commonweal, at least where the legislation at issue seeks only to adjust "burdens and benefits of economic life." *Turner Elkhorn*, 428 U.S. at 15. Hence, although Hochman considers the strength of the public interest served by a given statute, the Court's more recent decisions focus merely on whether a legislature has acted rationally.

writes, "a right is vested when it has been so far perfected that it cannot be taken away by statute." 73 Harv. L. Rev. at 696. The validity of USG's argument therefore turns on whether statutes such as the one under review actually confer rights that legislatures may not alter. Hochman dismisses this argument:

> It is immaterial for our purposes whether one accepts the view that the very existence of a legal right depends upon the availability of remedies through which the right can be asserted and enforced.
>
> Although the right-remedy dichotomy is conclusory only, and therefore of little use in deciding a particular case, the Court's use of this terminology has raised some problems. One is whether the state's characterization of a legally assertable claim or defense as either a right or a remedy will be binding on the Court in determining the constitutionality of a subsequent statute altering the legal effect of this claim or defense. One obvious example of this problem appears when the state extends its statute of limitations so as to revive barred claims and thereby deprive a defendant of a defense he would have had under the unamended statute. It seems clear that whether the state characterizes its statute of limitations as abrogating the remedy or the right is immaterial in determining whether the removal of the statutory defense deprives a defendant of due process. See Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); Campbell v. Holt, 115 U.S. 620 (1885). The question involves nothing more than an interpretation of the Constitution, *cf.* Hart & Wechsler, The Federal Courts and the Federal System 467 (1953), and this is true whether the claim asserted depends upon state or federal law . . . .

Id. at 711-12, n. 106 (citations omitted).

The Court of Appeals here likewise saw the substantive/procedural distinction as a red herring. Citing *Chase Securities* and *Campbell,* as well as *Industrial Union of Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976), the Court of Appeals concluded that even if the distinction urged by USG "proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim."[3] App. 7a.

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[3] USG complains that the Court of Appeals failed to distinguish *William Danzer & Co. v. Gulf & Ship Island R.R. Co.,* 268 U.S. 633 (1925). "[I]ndeed," writes USG, "*Danzer* was not even cited." Petition at 9. *Danzer* likewise receives no mention in *Turner Elkhorn, Gray,* and for that matter, Hochman's survey. Whatever else explains the tendency of *Danzer* to be overlooked, Wesley submits that *Danzer* can in fact be distinguished from the present case. In *Danzer,* the Court held that where the Interstate Commerce Act created a cause of action for damage claims and fixed a period in which such claims must be presented, a plaintiff's claim could not be revived by an amendment which would have made the claim timely. However, in subsequent cases, the Court did not follow *Danzer.* In *Chase Securities,* the Court relegated *Danzer* to a footnote. The Court determined that *Danzer* does not apply when a cause of action has a common law basis and is therefore independent of the statute creating the limitations period. 325 U.S. at 312, n.8. That is precisely the situation here. In *Robbins & Myers,* the Court effectively overruled *Danzer* when it declined to apply its holding. There, the Court applied the holding in *Chase Securities,* upholding an amendment extending a limitations period that had already expired and that was part of the original enabling act. 429 U.S. at 243-44. Thus, even if § 12-310 is somehow considered to be equivalent to a statute which creates a cause of action, it is clear under *Robbins & Myers* that the District of Columbia did not violate the Constitution when it revived time-barred claims against manufacturers and suppliers of defective and unsafe improvements to real property.

USG's substantive/procedural analysis does not adequately test the fairness of retroactive legislation because, as Hochman writes:

> the relevant factor in determining the weight to be given to the extent to which a preexisting right is abrogated is not whether the statute abolishes rights or remedies, but rather the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction; the greater the alteration of these legal incidents, the weaker is the case for the constitutionality of the statute.

Id. at 712.

USG never focuses upon preenactment "legal incidents" because to do so compels the conclusion that USG and other asbestos manufacturers received undeserved protection from the statute of repose. Before the statute of repose was passed, strict liability and other tort causes of action were commonly resorted to against asbestos manufacturers who, in turn, relied upon a panoply of traditional defenses. The statute of repose did not change the essence of these "legal incidents;" it merely set a time limit (ten years) within which a plaintiff's injury had to occur if it was to be actionable.

The statute of repose, however, had two odious effects: first, it often divested plaintiffs (like Wesley) of their causes of action against manufacturers before there had even been a realization of injury (which, unlike the instant case, was truly a matter of due process denied); and second, it made building owners legally responsible for the safety of building products in whose manufacture they played no part. The *status quo* was understandably appealing to USG and just as understandably the target

for remedial legislation by the City Council. Nonetheless, when the statute of repose was amended, the essential "legal incidents" once again did not change – the same causes of action exist and the same substantive defenses, only a time limit that unfairly protected manufacturers has been removed.

The third (and last) of the factors discussed by Hochman – the nature of the right affected by a retroactive statute – touches upon matters of reliance that simply do not avail USG:

> Although the Court has refused to give any significant weight to the fact that the right modified by a retroactive statute has been asserted in a suit prior to the passage of the statute, once such a right has been reduced to judgment, the interest in stability is present to a significantly greater degree than at any time before judgment. Moreover, there is likely to be substantial reliance on the judgment. For these reasons, the Court has indicated that it would be reluctant to permit the legislature to interfere with a right which has been "adjudicated . . . in final and unreviewable determination." However, it must be remembered that this is only one of many considerations in determining the constitutionality of retroactive legislation, and in any given case, the Court may deem the interests in the retroactive application of the statute to a right which has been reduced to judgment prior to its enactment sufficient to outweigh the disadvantages of such application. . . .

Id. at 718-19 (footnote omitted).

USG, of course, cannot contend that its rights under the statute of repose had been litigated to "unreviewable determination," a judgment upon which it was entitled to

rely. Moreover, another type of reliance of which Hochman writes is equally inapplicable to USG:

> [a statute] which has the effect of implementing the original intentions of the parties affected has generally been held constitutional since there is little injustice in retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose.

Id. at 720 (footnote omitted). As the Court of Appeals noted, the right of which USG was later divested was not in existence until 1972, "about 12 years after the last building at issue was completed. Thus [USG] made the sales [to Wesley] without reliance on the statute." App. 7a.

II. The Decision of the Court of Appeals Comports with the Resolution of Similar Cases by Other Courts.

USG's concern that the Court of Appeals' decision will "cause great confusion in both state and federal courts" is unfounded. *See* Petition at 12. Indeed, this argument ignores the numerous state and federal decisions upholding the constitutionality of similar revival statutes. In fact, "[s]ince *Chase Securities*, no federal court [has] struck down a revival statute." *In Re: Eastern and Southern Districts Asbestos Litigation* (E.D. N.Y. order entered Aug. 16, 1988)* at 10. In recent years, many states

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* Copies of all unpublished cases and materials cited herein have been lodged with the Clerk of the Court.

have amended their laws to revive time-barred claims involving personal injury and property damage caused by asbestos and other toxic substances. The federal courts are unanimous in their decisions upholding the constitutionality of such statutes. *See, e.g., Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459, 462 (6th Cir. 1982) (upholding the constitutionality of a retroactive amendment to Tennessee's ten-year product liability statute of repose, exempting asbestos personal injury actions, Tenn. Code Ann. § 29-28-103(b)); *In Re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 810-13 (E.D. N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) (upholding the constitutionality of a New York revival statute permitting servicemen injured by dioxin to bring suit regardless of when their injuries were discovered, New York Civ. Prac. Law 214-b); and *In Re: Eastern and Southern Districts Asbestos Litigation* (upholding the constitutionality of the New York Toxic Tort Revival Act, 1986 N.Y. Laws, ch. 682, § 4 (McKinney 1986), New York Civ. Prac. Law 214-c). The state courts have reached similar conclusions. *See City of Boston v. Keene Corporation*, 406 Mass. 301, 547 N.E.2d 328 (1989) (upholding the constitutionality of Massachusetts' revival statute for "asbestos-related corrective actions" brought by the Commonwealth or any of its political divisions, Mass. Gen. L. ch. 260, § 2D (West Supp. 1989)); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069 (1989) (upholding the constitutionality of the New York Toxic Tort Revival Act); and *In Re: State and Regents' Building Asbestos Cases*, No. 99081 (Minn. Dist. March 6, 1989) (upholding the constitutionality of a retroactive application of an amendment to Minnesota's ten-year

statute of repose, reviving time-barred asbestos cost recovery actions, Minn. Stat. §§ 541.051, 541.22 (1989)).[4]

USG ignores other cases which have employed the *Turner Elkhorn* analysis to uphold the constitutionality of a retroactive imposition of liability. In *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), the Eighth Circuit upheld the constitutionality of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). CERCLA retroactively imposes strict liability on persons responsible for the release of hazardous substances into the environment. The Eighth Circuit rejected the contention that because the statute "imposes a new kind of liability, retroactive application of CERCLA violates due process . . . ." 810 F.2d at 732. Relying on the rational basis test adopted by this Court in *Turner Elkhorn* and in *Pension Guaranty*, the Court of Appeals found that

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[4] USG cites only two decisions reaching a contrary result: *Colony Hill Condominium I Ass'n v. Colony Co.*, 70 N.C. App. 390, 320 S.E.2d 273 (1984), *rev. denied*, 312 N.C. 796, 325 S.E.2d 485 (1985) and *School Board of Norfolk v. United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (1987). Neither of these cases supports USG's position. In the latter case, the Virginia Supreme Court found the Commonwealth's revival statute violative of the due process clause of the Virginia Constitution, whose provisions are not at issue here. *Colony Hill* and the case on which it relies, *McCrather v. Stone & Webster Engineering Corp.*, 248 N.C. 707, 104 S.E.2d 858 (1958), exemplify the fallacious substantive/procedural analysis which this Court long ago rejected as noted by Hochman, discussed *supra*. Moreover, most state courts have interpreted legislation which revives a time-barred right of action as not violative of state constitutional due process provisions. *See School Board of Norfolk*, 360 S.E.2d at 335 (Whiting, J. dissenting).

defendants "failed to show that Congress acted in an arbitrary and irrational manner." "Cleaning up inactive and abandoned hazardous waste disposal sites," the court wrote, "is a legitimate legislative purpose and Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites on those parties who created and profited from the sites and on the chemical industry as a whole." 810 F.2d at 734. *Accord United States v. Monsanto Co.*, 858 F.2d 160, 174 n.31 (4th Cir. 1988), *cert. denied*, 491 U.S. ___, 109 S.Ct. 3156 (1989).[5]

Finally, USG also ignores those cases holding that retroactive statutes eliminating immunity from tort liability do not violate due process. In *Louviere v. Marathon Oil Co.*, 755 F.2d 428, 430 (5th Cir. 1985), the Fifth Circuit allowed Congress' retroactive cure of this Court's interpretation of the Longshoremen's and Harbor Workers Compensation Act in *Washington Metropolitan Area Transit Authority v. Johnson*, 468 U.S. 1226 (1984). In *Washington Metropolitan Area Transit Authority*, the Court held that general contractors were immune from suit brought by a subcontractor's employees unless the contractor neglected to secure compensation coverage for those

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[5] USG cites *United States v. Rohm and Haas Co.*, 669 F. Supp. 672 (D. N.J. 1987), for the concept that "vested" substantive rights, as opposed to procedural rights, may not be altered retroactively. *See* Petition at 12. USG fears that confusion will result from the coexistence of the *Rohm and Haas* holding and that reached by the Court of Appeals here. On the contrary, it is plain from reading *Chase Securities* and Hochman's survey of other cases which consider vested rights that *Rohm and Haas* relies on a long-abandoned test for the constitutionality of retroactive economic statutes.

employees after the subcontractor failed to do so. While the case was still on appeal, Congress amended the statute to immunize contractors from suit by a subcontractor's employees only if the subcontractor had been statutorily required to obtain coverage for the subcontractor's employees. The Fifth Circuit rejected the contractor's contention that the application of the amendments "would violate [its] due process rights by retroactively divesting it of its vested right to a defense under § 905(a) as interpreted by *Washington Area Transit Authority* or by creating a cause of action on a retrospective basis . . . ." 755 F.2d at 430. The court observed that Marathon Oil "of course has no vested right to act negligently; nor is there any suggestion of significant detrimental reliance on the rule of *Washington Area Transit Authority*." 755 F.2d at 430.

The District of Columbia amended § 12-310 to cure the effect of the District of Columbia Court of Appeals' decision in *J.H. Westerman* deeming manufacturers and suppliers to be within the ambit of the statute. The statute's 1986 amendment was designed to bring § 12-310 into conformity with the "overwhelming majority" of jurisdictions which limit such statutory protection to designers and builders. *See City Council of the District of Columbia Roundtable Meeting of the Judiciary Committee on Bill 6-510* (Oct. 15, 1986) at 2; *see also J.H. Westerman Co.*, 499 A.2d at 120 ("overwhelming majority of such state statutes . . . exclude from their coverage product manufacturers and suppliers."). As noted earlier, USG sold its product to Wesley many years before *J.H. Westerman* and therefore did not rely on the *J.H. Westerman* court's interpretation of § 12-310.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 2, 1990

(3)

No. 89-777

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER UNITED STATES GYPSUM COMPANY

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REPLY BRIEF OF PETITIONER UNITED STATES GYPSUM COMPANY

Petitioner United States Gypsum Company ("U.S. Gypsum") respectfully submits this Reply Brief in accordance with Supreme Court Rule 15.6 to address arguments first raised in the Brief in Opposition of the Wesley Theological Seminary of the United Methodist Church ("Wesley").

I. DUE PROCESS CHALLENGES TO THE REVIVAL OF TIME-BARRED CLAIMS ARE NOT GOVERNED BY THE TEST ENUNCIATED IN *USERY v. TURNER ELKHORN MINING CO.*

Wesley urges that the traditional "substantive/procedural" or "right/remedy" distinction, which this Court has applied in *every* case that it has decided involving a

due process challenge to the retroactive revival of time-barred claims, is nothing more than a "red herring" [Brief in Opposition, p. 10] and "a long-abandoned test" [Brief in Opposition, p. 16 n.5]. Instead, Wesley suggests that all retroactive legislation should be tested by three criteria suggested by a law review article written 30 years ago.[1] The test suggested by Wesley has *never* been adopted by this Court or any other federal court to U.S. Gypsum's knowledge. It was certainly not applied by either of the courts below.[2] Indeed, if the constitutional test urged by Wesley is to be adopted, certiorari should be granted for that reason alone.

Wesley attaches some unspecified significance to the fact that the case of *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925) was not mentioned in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) or *Pension Benefit Guaranty Corp. v. R.A. Gray*

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[1] Even Wesley does not defend the Court of Appeals' improper application of the test enunciated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[2] Although it is clear that the Court of Appeals did not purport to apply the three-pronged law review test, Wesley attempts to recast the Court of Appeals' approach in terms of such a test. Indeed, that type of *post hoc* analysis was a problem in the Court of Appeals in this case. Adopting for the first time a mere rationality test for a challenge to the revival of a claim, as to which the right had been extinguished by a substantive statute of repose, the Court of Appeals decided that issue on the *mistaken* belief that "defendant makes no claim of irrationality." [App. 7a]. U.S. Gypsum unquestionably did challenge the rationality of the 1986 amendments. Indeed, the District Court specifically noted this challenge and stated that it did not reach that issue "as it finds that the statute may not be retroactivity applied without effecting a deprivation of due process." [App. 21a n.10]. U.S. Gypsum specifically raised this point in its Petition for Rehearing, but to no avail. Wesley's attempt to have this Court believe that U.S. Gypsum never challenged the rationality of the amendments to the statute of repose [Brief in Opposition, p. 7] is, at a minimum, disingenuous.

& Co., 467 U.S. 717 (1984). [Brief in Opposition, p. 10 n.3]. What is truly significant is that not only *Danzer*, but also the other decisions of this Court that have addressed revival of time-barred claims, *e.g.*, *Campbell v. Holt*, 115 U.S. 620 (1885); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), were not cited or discussed in *Turner Elkhorn* or *Gray*. It is equally significant that in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), this Court's most recent decision involving a due process challenge to the revival of a time-barred claim, no mention was made of *Turner Elkhorn* which had been decided earlier that same term.[3] These observations lead to the inevitable conclusion that a different analysis applies to the retroactive revival of time-barred claims than to other types of retroactive economic legislation. For the Court of Appeals to have nevertheless relied on *Turner Elkhorn* and ignored *Danzer* highlights the importance of review by this Court to clarify the constitutional standard applicable to the retroactive abrogation of vested substantive rights conferred by statutes of repose.

II. WHETHER A RIGHT HAS VESTED IS IMPORTANT FOR CLAIMS UNDER THE DUE PROCESS CLAUSE

Wesley suggests that the question of whether a right has vested is not pertinent to a due process challenge to retrospective civil legislation. [Brief in Opposition, pp.

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[3] Wesley's argument that *Danzer* was effectively overruled in *Robbins & Myers* is neither borne out by the *Robbins & Myers* opinion nor by any subsequent decision. To the contrary, in *Robbins & Myers*, this Court recognized the continuing validity of *Danzer* and the continued validity of the right/remedy distinction discussed in *Chase Securities*. 429 U.S. at 243-44. The *Chase Securities* and *Danzer* results were different because in *Chase Securities* "the effect of the legislation was merely to reinstate a lapsed remedy, . . . appellant had acquired no vested right to immunity . . . and . . . reinstatement of the remedy by the state legislature did not infringe any federal right . . . ." 425 U.S. at 312 n. 8.

8-9]. Wesley's suggestion cannot be reconciled with the decisions of this Court. For example, in *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981), this Court recognized that although "a law need not impair a 'vested right' to violate the *ex post facto* prohibition," "[e]valuating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements." The Court further noted that "the concept of vested rights" is elemental to "the test for evaluating retrospective laws in a civil context." 450 U.S. at 29 n. 13.

The Court of Appeals failed to perceive the distinction of constitutional magnitude between a mere expectation and the vesting of a right conferred by affirmative legislative action. [App. 7a-8a]. It is this very distinction which underlies the development of two independent lines of precedent in this Court.

III. WESLEY CITES NEITHER FEDERAL NOR STATE COURT DECISIONS WHICH FOLLOW THE COURT OF APPEALS' UNPRECEDENTED APPLICATION OF THE *TURNER ELKHORN* TEST TO THE REVIVAL OF TIME-BARRED ACTIONS

Wesley argues that the decision of the Court of Appeals comports with the resolution of similar cases by other courts. This argument is both inaccurate and misleading. All of the cases cited by Wesley explicitly employed the right/remedy distinction that Wesley disparages, and none of the cases applied the *Turner Elkhorn* analysis adopted by the Court of Appeals panel here. The question presented in *Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459 (6th Cir. 1982) was "whether Tennessee's ten-year *statute of limitations* based on sale, adopted July 1, 1978 . . . created for defendant a vested right barring plaintiff's claim despite a July 1, 1977, statutory amendment excluding asbestos-related disease actions." 696 F.2d at 460 (emphasis added). The *Murphree* Court relied on *Chase Securities* and *Campbell*

v. Holt and the concept that *statutes of limitations* go to matters of remedy rather than the destruction of rights. *Id.* at 462.

Similarly, in *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), the court addressed an amendment to a procedural statute of limitations and not a substantive statute of repose. The *Agent Orange* Court relied on *Chase Securities* and the right/remedy distinction in rejecting the due process challenge in that case. In both *In Re: Eastern and Southern Districts Asbestos Litigation*, (E.D.N.Y. 1988) and *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069 (1989), the courts were again addressing the revival of claims which had previously been barred by a *statute of limitations*. In rejecting the federal due process challenges in those cases, the *Hymowitz* court relied exclusively on *Chase Securities*; the court in *In Re: Eastern and Southern Districts Asbestos Litigation* relied upon *Chase Securities* and *Robbins & Myers*.

The most recent decision cited by Wesley is *City of Boston v. Keene Corporaiton*, 406 Mass. 301, 547 N.E.2d 328 (1989), a case expressly decided on the right/remedy and procedure/substance distinction. The *City of Boston* case involved a due process challenge to a statute reviving claims as to which the *statute of limitations* had run. The Court rejected the challenge to that statute noting:

> [T]he defendants' interest in the limitations defense is procedural rather than substantive. We have held that, in cases not involving claims to real property, the running of the applicable limitations period bars only the legal remedy, while leaving the underlying cause of action unaffected. * * * Consequently, the running of the limitations period on such claims does not create a vested right which cannot constitutionally be taken away by subsequent statutory revival of the barred remedy.

547 N.E.2d at 335.

The continued validity of the right/remedy and substance/procedure distinction as a critical factor in the analysis of due process challenges to statutes reviving time-barred claims is demonstrated in both the cases cited by U.S. Gypsum and those cited by Wesley. These cases make it clear that different results obtain where the statutory time bar has extinguished the claim or conferred immunity (*i.e.*, statutes of repose) rather than barred the remedy (statutes of limitations). The holding and the analysis of the Court of Appeals are anomalous and inconsistent with this Court's precedents. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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